CLERK'S COPY.

7

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 684

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD J. REYNOLDS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 7, 1941

CERTIORARI GRANTED FEBRUARY 17, 1941

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD J. REYNOLDS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Original	Print
Proceedings before United States Board of Tax Appeals	1	1
Docket entries	1	1
Petition	2	2
Exhibit A—Notice of deficiency	12	8
Exhibit B—Will of R. J. Reynolds	24	24
Answer	30	22
Stipulation of facts	34	24
Submission under Rule 30	40	27
Opinion, Sternhagen, M	41	28
Concurring opinion, Disney, M	43	29
Decision	45	31
Petition for review	46	31
Praecipe for transcript of record	58	39
Clerk's certificate [omitted in printing]	60	39
Proceedings in U. S. C. C. A., Fourth Circuit	61	40
Docket entries	61	40
Appearance for petitioner	61	40
Appearance for respondent	61	40
Argument of cause	62	40
Opinion, Soper, J	63	41
Judgment	83	55
Issuance of mandate	83	55
Clerk's certificate [omitted in printing]	84	56
Stipulation re exhibits	85	56
Order allowing certiorari		57

BLANK PAGE

1 Before United States Board of Tax Appeals

Docket No. 94108

RICHARD J. REYNOLDS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: J. G. Korner, Jr., Esq., H. G. Hudson, Esq., Stratton Coyner, Esq. For Comm'r: Rollin H. Transue, Esq.

Docket entries

—

Mr. Sternhagen, April 12, 1939.

1938

June 3—Petition received and filed. Taxpayer notified. (Fee paid.)
June 3—Copy of petition served on General Counsel.
July 26—Answer filed by General Counsel.
July 26—Request for Circuit hearing in Washington, D. C., filed by General Counsel.
Aug. 2—Notice issued placing proceeding on Washington, D. C., calendar. Answer and request served.

1939

Jan. 11—Hearing set March 2, 1939.
Feb. 14—Motion for a continuance to April 17, 1939, filed by taxpayer. February 15, 1939, granted.
Apr. 12—Stipulation to submit on the filing of the attached stipulation of facts together with certain exhibits filed.
Apr. 12—Stipulation of facts filed.
Apr. 12—Order assigning this proceeding to Div. 10, Mr. Sternhagen, for fixing of time for briefs and for report, entered.
Apr. 19—Agreed motion for designation of time to file briefs: June 15 for petitioner's brief; 15 days thereafter for respondent's brief; and 15 days for taxpayer to reply if he so desires; filed.
Apr. 20—Agreed motion for designation of time to file briefs granted. Let briefs be filed at time requested.
June 5—Brief filed by taxpayer. June 6, 1939, copy served.
June 20—Reply brief filed by General Counsel.
June 24—Reply brief filed by taxpayer. June 24, 1939, copy served.

1940

Jan. 10—Opinion rendered, John M. Sternhagen, Div. 10. Decision will be entered for the respondent.
Jan. 11—Decision entered, J. M. Sternhagen, Div. 10.
Feb. 23—Motion to fix the sum of supersedeas bond at $49,123.98 filed by taxpayer.

1940
Feb. 23—Order fixing amount of bond at $50,000 entered.
Mar. 14—Supersedeas bond in the sum of $50,000.00 approved and ordered filed and power of attorney.
Mar. 25—Petition for review by U. S. Circuit Court of Appeals (4) with assignments of error filed by taxpayer.
Mar. 25—Proof of service filed.
Mar. 26—Praecipe for record filed with proof of service thereon.

2 Before United States Board of Tax Appeals

[File endorsement omitted.]

Docket No. 94108

RICHARD J. REYNOLDS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition

Filed June 3, 1938

Comes now the petitioner and petitions the Board for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (It:C:1:NFP:90D), dated March 11, 1938, and as a basis of this proceeding alleges as follows:

1. The petitioner, an individual taxpayer, is a citizen of the State of North Carolina and resides in Winston-Salem, North Carolina, and filed his income-tax return for the year 1934 in the office of the Collector of Internal Revenue for the District of North Carolina.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on March 11, 1938.

3. The tax in controversy is income tax for the calendar year 1934, and is in the amount of $33,878.61.

4. The determination of tax as set forth in the said deficiency notice is based upon the following errors:

(a) The Commissioner erred in that in computing gain or loss upon the sale of certain personal property he used, as the basis for such computation, an adjusted value of the said personal property as of the date of the death of petitioner's father, who
3 died on July 19, 1918, instead of using, as such basis, the fair market price or value of such property at the time of its acquisition by the petitioner, which was on April 4, 1934.

(b) The Commissioner erred in mis-stating the provisions of the statute in his statutory deficiency notice of March 11, 1938. In his said notice (at page 2 thereof) the Commissioner stated:

"Under the will of your father who died in 1918, certain securities of the estate were to be held in trust for you by the Safe Deposit and Trust Company, Baltimore, Maryland, until you became 28 years of age, which was April 4, 1934. Some of the securities received when the trust was distributed to you in 1934 were sold by you in 1934, and in computing the profit or loss sustained, you used as cost the market value on the date of distribution, April 4, 1934, whereas according to section 113 (a) (5) of the Revenue Act of 1934, the basis to be used in the case of a sale is the value at the date of death * * *."

whereas the said section of the statute provides that:

"If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition."

The determination of the Commissioner in his said notice is not in accordance with the provisions of the statute and is erroneous.

(c) The Commissioner erred in holding that the basis for computing gain or loss in this case is the value at the date of death of petitioner's father in 1918, for the reason that until April 4, 1934, petitioner's interest in the trust corpus was merely contingent and expectant, and petitioner did not acquire a substantial ownership in the trust corpus until the happening of the contingency which gave rise to petitioner's ownership in a portion of the assets comprising the corpus of the trust; and that only upon the happening and fulfillment of the said contingency did petitioner acquire ownership of the property which was sold by the petitioner in 1934.

4 5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) R. J. Reynolds (senior), father of the petitioner, died on July 19, 1918, leaving four infant children surviving him. Petitioner, the oldest of said children, was born April 4, 1906, and was approximately 12 years of age at the date of his father's death.

(b) R. J. Reynolds (senior) died leaving a last will and testament which was duly admitted to probate and which was duly administered in accordance with its terms. Portions of the said will which are pertinent and material in this cause are attached hereto and made a part hereof as Exhibit B.

(c) In his said last will and testament the decedent, after making certain bequests and devises not material in this cause, gave, devised, and bequeathed two-thirds of his estate of every kind, character, and description, to Safe Deposit & Trust Company of Baltimore, Maryland, as Trustee, to hold, dispose of, and distribute, upon certain terms and conditions, for the benefit of decedent's four children.

(d) The trust created by the said will of the decedent directed the trustee:

1. To apply so much of the trust income as was deemed necessary for the support, maintenance, and education of each child until each such child should arrive at the age of 21 years;

2. From and after the date each child should arrive at the age of 21 years and until each such child should attain the age of 28 years, the Trustee was authorized and directed to pay annually to each child not less than \$5,000 and not more than
5 \$50,000, out of the trust income of such child;

(3) The balance of the income, over and above the amounts so paid as aforesaid, was directed to be accumulated by the Trustee for each such child until such child should attain the age of 28 years at which time "each of them shall become entitled to and shall respectively receive from said Trustee" a portion of the corpus of the trust together with the accumulated income thereon;

(4) To encourage habits of industry, thrift and economy in the children, the Trustee was directed to pay to each child (who had attained the age of 21 years but had not attained the age of 28 years) \$2.00 for every \$1.00 made or saved by such child in legitimate business or investments (but not in speculation on margin in "futures"); with the further provision that such payment should be made in cash or securities up to the full extent of the trust property administered for the benefit of such child;

(5) In the event any child should die before arriving at the age of 28 years, then the share of the trust "which would have been payable to him or her, had he or she arrived at that age," to be held by the Trustee for the benefit of, and the income paid to, the devisee of such child until the time when such child would have arrived at the age of 28 years if he had lived, at which time the trust should cease and the estate should become payable to such devisee;

(6) But should any child die intestate before reaching the age of 28 years, leaving surviving issue, the share of the trust estate to which he would have become entitled if he had lived to be 28 years of age, was to continue to be held by the Trustees

in trust, for the benefit of, and the income applied
6 to the support and maintenance of, the surviving issue of
such deceased child, until the time when the deceased child
would have arrived at the age of 28 years if he had lived; at which time the trust should cease "and the estate shall then become vested" in such surviving issue;

(7) But should any child die intestate before reaching the age of 28 years, and without issue living at the termination of the trust, then the trust should continue, and be held by the Trustee, on like trusts for the benefit of the surviving brothers and sisters of such deceased child and the then living issue of any deceased brother or sister per stirpes.

(8) If each and all of the children of testator should die without having attained the age of 28 years and without issue surviving at the termination of the trust, then and in that event one-half of the trust estate should go to and belong to the wife of the testator and the other one-half to the living brothers and sisters of the testator and the living descendants of any deceased brothers and sisters, per stirpes.

(e) The said will and testament of decedent provided for the substitution of a trustee or trustees and directed that, "so often as any new Trustee, or Trustees, shall be substituted or appointed, as aforesaid, all the property, real, personal, and mixed of every nature and kind whatsoever and wherever situated, which shall be held upon the trusts herein created, shall be conveyed, assigned, and transferred, respectively, in such manner that the same shall become legally and effectually vested in the new Trustee, or Trustees."

(f) The Trustee, Safe Deposit & Trust Company, took over
the assets of the trust and administered them under the
7 terms of the trust, and so continues to administer the said
trust to the present date.

(g) One son of testator died in 1932, before reaching the age of 21 years, leaving an infant child approximately 2 years of age and another child in ventre sa mere who was born about six months thereafter. At the date of his brother's death petitioner was 26 years of age.

(h) Petitioner attained to the age of 28 years on April 4, 1934, and on said date became entitled to a portion of the corpus of the trust which became vested in him on said date.

(i) Prior to April 4, 1934, the interest of petitioner in the trust corpus was contingent and did not constitute a substantial ownership of the trust corpus, and the ownership of a substantial interest or estate in the said corpus was not acquired by petitioner until April 4, 1934.

(j) At the date of the death of the father of petitioner, the interest of petitioner was only the right to receive income from the trust, under certain prescribed conditions, until he should attain the age of 28 years, or until he should die prior to attaining that age; that in the event he should die prior to attaining the age of 28 years, he could come into no interest or estate in the trust corpus; that upon the condition and in the event he should attain to the age of 28 years he would acquire an interest and estate in the said trust corpus; that unless and until the happening of the said condition precedent (viz, attaining to the age of 28 years), no ownership, right, dominion, control, interest, or estate in the trust corpus was acquired by petitioner or vested in him; that at the date of the death of his father petitioner was 12 years
8 of age, and his interest was contingent and expectant only, and was too insubstantial and remote to constitute the acquisition by him of the ownership of the trust corpus.

(k) To hold that petitioner acquired the ownership of the trust corpus at the date of his father's death in 1918 would be inconsistent and unreasonable and directly opposite to the letter, spirit, and purpose of section 113 (a) (5) of the Revenue Act of 1934, and of all prior revenue acts containing the same provision as that said section; that so to hold would achieve the very opposite of what Congress intended by the enactment of said section, and would cause absurd, illogical, and inconsistent results.

(l) To hold that petitioner acquired the ownership of the trust corpus at the date of his father's death in 1918 would be contrary to law and the authoritative and controlling decisions relative thereto.

(m) To hold that petitioner acquired the ownership of the trust corpus at the date of his father's death in 1918 would be contrary to the laws of the State of North Carolina controlling and governing the property rights and estates of both the petitioner and his father, citizens and residents of the State of North Carolina.

(n) To hold that petitioner acquired the ownership of the trust corpus at the date of his father's death in 1918, would be contrary to, and violative of, the long-continued administrative and legislative history, interpretation, and administration of the section, and its identical predecessor sections in the statutes.

(o) Petitioner attained to the age of 28 years on April 4, 1934, and on that day occurred the event, prescribed by the trust, giv-

ing rise to ownership in petitioner of a certain portion of the trust corpus, and on said date petitioner acquired the ownership thereof.

9 (p) In accordance with the authority and direction contained in the trust instrument, the trustees transferred, delivered, and distributed to petitioner the portion of the assets comprising the corpus of the trust, which were acquired by petitioner on April 4, 1934, among said assets being certain stocks and securities.

(q) Thereafter, and in the said year 1934, the petitioner sold certain of the said stocks and securities acquired by him on April 4, 1934, as aforesaid.

(r) In his income-tax return for the said year 1934, petitioner reported the said sales made by him, and in computing the gains and losses arising upon such said sales, the petitioner compared the sales price received by him in said sales with the statutory basis thereof which was the fair market value of such said property at the time of his acquisition thereof, viz, the fair market value of such said property on April 4, 1934, and computed and reported his taxable income accordingly.

(s) The respondent has determined (and has so advised petitioner in his statutory notice of deficiency, Exhibit A, attached hereto) that the basis to be used by petitioner in computing his gains and losses on said sales is the value at the date of the death of petitioner's father; whereas such said determination is not in accordance with the terms of the statute, which provides that the basis shall be the fair market value at the date of acquisition of the property by petitioner.

(t) The petitioner correctly computed and reported his taxable income arising upon the sales made by him of the property acquired by him on April 4, 1934, and such computation and report was in accordance with the express provisions of the statute.

10 (u) The action of the respondent in determining that, in the sales involved in this cause, the basis is the value at the date of the death of petitioner's father, was erroneous and was not in accordance with the statute or with law, but is violative of law and of the taxing statute, and is violative of the Sixteenth Amendment in that it purports to compute and impose an income tax upon property which is not income, and in that, under the guise of an income tax, its effect is wrongfully and illegally to extract and take from the petitioner a portion of his capital.

(v) The action of the respondent is unwarranted and illegal and is without authority or support of, and is violative of, the basic law, the Revenue Act, the controlling judicial authorities, the laws of the State of North Carolina, and the long continued

administrative and legislative history and interpretation which has received repeated legislative approval and adoption by re-enactments in light thereof—and more particularly by the enactment of section 113 (a) (5) of the Revenue Act of 1934, in light of such history, interpretation and administration.

Wherefore, Petitioner prays the Board to hear his said appeal and to find, determine and order that there is no deficiency due from the petitioner for the year 1934.

(s) J. G. KORNER, Jr.,
J. G. Korner, Jr.,
Transportation Building, Washington, D. C.
(s) H. G. HUDSON,
H. G. Hudson,
Wachovia Bank Building, Winston-Salem, N. C.
(s) STRATTON COYNER,
Stratton Coyner,
Reynolds Building, Winston-Salem, N. C.
Attorneys for Petitioner.

11 [Duly sworn to by Richard J. Reynolds; jurat omitted in printing.]

12 *Exhibit A to petition*

IT: C: 1.
NFP: 90D.

MAR. 11, 1938.

MR. RICHARD J. REYNOLDS,
1206 Reynolds Building,
Winston-Salem, North Carolina.

SIR: You are advised that the determination of your income tax liability for the taxable year ended December 31, 1934 discloses a deficiency of $33,878.61 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: C1: P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest

period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,
By (Signed) JOHN R. KIRK,
Deputy Commissioner.

Enclosures:
- Statement.
- Form 870.
- Exhibit A.

13

STATEMENT

IT: C: 1 MR. RICHARD J. REYNOLDS

NFP: 90D

1206 Reynolds Building, Winston-Salem, North Carolina

TAX LIABILITY FOR TAXABLE YEAR ENDED DECEMBER 31, 1934

Income Tax: Liability, $207,051.03. Assessed, $173,172.42. Deficiency, $33,878.61.

In making this determination of your income tax liability careful consideration has been given to the internal revenue agent's reports dated March 2, 1936 and March 8, 1937; to your protest filed April 27, 1936; and to the statements made at the conference held on April 27, 1936.

A copy of this letter, together with a copy of the statement, has been mailed to your representative, Mr. Stratton Coyner, Reynolds Building, Winston-Salem, North Carolina.

ADJUSTMENTS TO NET INCOME—1934

Net income as disclosed by return	$313, 909. 27
Unallowable deductions and additional income:	
(a) Capital net gain not agreed to	61, 027. 63
(a) Capital net gain agreed to	1, 426. 91
(b) North Carolina Sales taxes	677. 38
(c) Loss on worthless stocks	45, 220. 00
(d) Excessive depreciation	427. 34
(e) Legal fees and commissions	8, 374. 02
(f) Interest on gold deposits	3, 278. 57
Total	$434, 341. 12
Nontaxable income: (g) Nontaxable dividends	100. 00
Net income adjusted	$434, 241. 12

EXPLANATION OF ADJUSTMENTS

You have agreed to the adjustments (b) to (g), inclusive, and to changes in capital net gain amounting to $1,426.91, and the resulting deficiency in tax of $31,022.32, has been assessed. These changes are fully explained in the revenue agent's reports referred to above, which are hereby made a part of this letter.

With reference to the increase in capital net gain not agreed to, $61,027.63, it consists of three items, as follows:

		Increase
(1) Loss reported	$29,536.13	
Corrected gain	2,275.61	
		$31,811.74
(2) Gain reported	$4,555.00	
Gain corrected	12,454.09	
		7,899.09
(3) Loss reported	$21,092.50	
Gain as corrected	224.30	
		21,316.80
Net increase not agreed to		$61,027.63

Under the will of your father who died in 1918, certain securities of the estate were to be held in trust for you by the Safe Deposit and Trust Company, Baltimore, Maryland, until you became 28 years of age, which was April 4, 1934. Some of the securities received when the trust was distributed to you in 1934 were sold by you in 1934, and in computing the profit or loss sustained, you used as cost the market value on the date of distribution, April 4, 1934, whereas according to section 113 (a) (5) of the Revenue Act of 1934, the basis to be used in the case of a sale is the value at the date of death or the cost to the trustee if the securities were acquired by the trust by purchase subsequent to the date of death. The correct computation of the profit under item (1) above, is as follows:

15 Security	Date acquired	Cost or value	Date sold	Received	Profit or loss	% taxable	Taxable profit or loss
Baltimore City Sewer	Sept. 9, 1927	$50,843.75	Apr. 10, 1934	$54,062.50	$3,218.75	40	$1,287.50
New Jersey Highway	Aug. 6, 1930	525,577.28	Apr. 12, 1934	1,059,576.64	29,682.90	60	23,809.79
	Sept. 30, 1930	126,704.77					
	Oct. 2, 1930	144,770.92					
	Apr. 1, 1931	15,562.50					
	Oct. 24, 1930	207,275.18					
Maryland Bridge	Aug. 31, 1927	7,252.11	June 15, 1934	7,000.00	(252.11)	40	(100.84)
Maryland Lateral and Post Road	Aug. 31, 1927	24,864.41	June 15, 1934	24,000.00	(864.41)	40	(345.76)
Kingdom of Great Britain and Ireland	Apr. 17, 1934	474,112.50	Apr. 18, 1934	467,338.40	(6,774.10)	100	(6,774.10)
	Apr. 13, 1934	585,772.50	Apr. 14, 1934	578,394.61	(7,377.89)	100	(7,377.89)
State of Maryland Trunk Lines Road	Oct. 6, 1922	5,139.55	Aug. 15, 1934	5,000.00	(139.55)	30	(41.87)
State of Maryland Construction Loan of 1922	Oct. 6, 1922	4,110.84	Aug. 15, 1934	4,000.00	(110.84)	30	(33.25)
State of Maryland Construction Loan of 1927	Aug. 26, 1927	27,911.27	Aug. 16, 1934	27,000.00	(911.27)	40	(364.51)
U. S. Liberty Loan	June 1, 1921	1,000.00	Sept. 26, 1934	1,002.50	2.50	30	0.75
State of California	July 17, 1931	274,369.43	Oct. 17, 1934	260,650.00	(13,719.43)	60	(8,231.66)
16 U. S. Treasury	July 18, 1932	13,056.00	Apr. 7, 1934	12,956.00	(100.00)	80	(80.00)
	Dec. 11, 1933	92,746.32	Apr. 7, 1934				
	Jan. 9, 1934	2,422.49	Apr. 7, 1934	135,734.34	527.45	100	527.45
	Jan. 11, 1934	13,113.75	Apr. 7, 1934				
	Jan. 15, 1934	23,809.97	Apr. 7, 1934				
	Jan. 17, 1934	3,024.36	Apr. 7, 1934				
Total							$2,275.61
Loss as reported							29,536.13
Increase in income							$31,811.74

17 (2) You reported a profit of $4,555.00 on the sale of 1,000 shares of R. J. Reynolds Tobacco Co. "B" stock which was part of the 2,000 shares in the trust created under the will of your father. In computing the cost you used, as under item (1) above, the value of April 4, 1934, the date the stock was delivered to you by the trust whereas the value at the date of death represents the cost to you. On account of various stock dividends, sales and other changes the 2,000 shares had by 1934 become 203,543 shares with a book value of $865,831.66. The cost of and the profit on the 1,000 shares sold in 1934 has been computed as follows:

Acquired or sold	Common "A"	Common "B"
December 30, 1918—Transferred from estate of R. J. Reynolds to trust for R. J. Reynolds, Jr.	4,207	2,000
December 6, 1920—From estate to trust		64
August 31, 1920—4 new for 1 old	16,828	8,256
August 31, 1920—200% stock dividend paid in "B" on "A" and "B" holdings		16,512 33,656
Total	16,828	58,424
April 22, 1922—Sale		2,750
April 26, 1922—Balance		55,674
December 4, 1922—33⅓ stock dividend paid in "B" on "A" and "B" holdings		18,558 6,509⅓
Total	16,828	79,841⅓
Sale (December 22, 1922)		⅓
Balance	16,828	79,841
February 16, 1927—25% stock dividend paid in "B" on "A" and "B" holdings		19,960¼ 4,207
Total	16,828	104,008¼
18 February 16, 1927, to December 21, 1927—Sales	16,828	16,000¼
Balance	0	88,008
January 3, 1929—Sale		5,000
Balance		83,008
February 11, 1929—2½ new for 1 old		207,520
June 12, 1929—Delivered to you		3,977
April 7, 1934—Transferred to you from the trust		203,543

COST OF R. J. REYNOLDS TOBACCO CO. "B" BASED ON VALUE AT DATE OF DEATH

Acquired or sold	"A" shares	Value	"B" shares	Value
Dec. 30, 1918—From estate	4,207	$1,051,750.00	2,000	$410,000.00
Nov. 21, 1919—50% stock right payable in 7% preferred. Cost apportioned to rights:				
"A" .007212%		7,585.22		
"B" .008102%				3,324.28
Adjusted cost of shares	4,207	1,044,164.78	2,000	406,675.72
Dec. 6, 1920—From estate			64	13,120.00
Total	4,207	1,044,164.78	2,064	419,795.72

COST OF R. J. REYNOLDS TOBACCO CO. "B" BASED ON VALUE AT DATE OF DEATH—Continued

Acquired or sold	"A" shares	Value	"B" shares	Value
Aug. 31, 1920—4 shares of new for 1 old	16,828	$1,044,164.78	8,256	$419,795.72
19 Aug. 13, 1920—200% stock dividend paid in "B" on "A" and "B" holdings—Common "B" acquired on "A," cost apportioned to "B," .568966% (.568966%×$1,044,064.78)		(593,994.26)	33,656	593,994.26
Cost	16,828	450,170.52	58,424	1,013,789.98
April 22, 1922—Sale			2,750	47,718.77
Balance	16,828	$450,170.52	55,674	$966,071.21
Dec. 4, 1922—				
33⅓% stock dividend paid in "B" on "A" and "B" holdings			18,558	0
"B" stock acquired on "A," cost apportioned to "B," .187562% ($450,170.52×.187562%)		(84,434.88)	5,009½	84,434.88
Balance	16,828	365,735.64	79,841½	1,050,506.09
Dec. 22, 1922—Sale			½	4.39
Balance	16,828	$365,735.64	79,841	$1,050,501.70
20 Feb. 16, 1927—				
25% stock dividend paid in "B" on "A" and "B" holdings			19,960¼	0
"B" acquired on "A," cost apportioned to "B," .17868% ($365,735.64 × .17866%)		(65,343.43)	4,207	65,343.43
Adjusted cost	16,828	$300,392.21	104,008¼	$1.115,845.13
Feb. 16, 1927—Sales through Dec. 21, 1927			16,000¼	171,657.54
Balance	16,828	$300,392.21	88,008	$944,187.59
Dec. 21, 1927—Sale	16,828	300,392.21		
Balance			88,008	$944,187.59
Jan. 31, 1929—Sale			5,000	53,642.15
Balance			83,008	$890,545.44
Feb. 11, 1929—2¼ shares new for one old			207,520	$890,545.44
June 12, 1929—Delivered to you			3,977	17,066.78
Balance distributed from the trust to you on April 4, 1937			203,543	$873,478.66
Cost of one share based on above				$4,291.37
June 18, 1934—Sold through R. J. Reynolds & Co. brokers, 1,000 at a cost of				$4,291.37
Cost as reported on your return				41,250.00
Decrease in cost, additional income				$36,958.63

21 Received from sale of above 1,000 shares	$45,803.00
Cost computed as above	4,291.37
Profit	$41,513.63
30% taxable	$12,454.09
Profit reported	4,555.00
Increase (item 2 above)	$7,899.09

(3) You reported a loss of $21,092.50 on the sale of bonds of the City of Philadelphia which had been received through the above-mentioned trust and which the revenue agent increased to a profit of $103,905.64 by using the cost of the securities of the trust in 1932 instead of the value at the date of distribution to you on April 4, 1934. However, it appears that in the years 1929, 1929, 1930, and

1931 the Safe Deposit and Trust Co. as trustee of the R. J. Reynolds, Jr., Trust purchased bonds of the City of Philadelphia which they sold at a loss in the year 1932 and claimed the loss as a deduction on the return filed for the trust. Similar securities were immediately repurchased by the trust and the loss claimed on the sale was disallowed in the return of the trust for the year 1932 under the wash sale provisions of section 118 of the Revenue Act of 1932. An appeal was filed by the trust with the United States Board of Tax Appeals against the deficiency in tax resulting from the disallowance of the loss. This appeal has now been settled and in some instances the sales made by the trust were held to be wash sales and in other instances they were held not to be wash sales.

Exhibit A attached shows the computation of the profit and loss on these securities based on the final settlement of the appeal and instead of a loss of $21,092.50 as computed by you and a gain of $103,905.54 as computed by the revenue agent there is a profit of $224.30.

Loss as reported	$21,092.50
Gain as corrected	224.30
Increase in income	$21,316.80

22 COMPUTATION OF TAX—1934

Net income adusted		$434,241.12
Less: Personal exemption and credit for dependent		2,900.00
Balance (surtax net income)		$431,341.12
Less:		
Dividends	$706,144.90	
Earned income credit	300.00	
		706,444.90
Subject to normal tax		None
Surtax on $431,341.12 (amount in excess of $4,000)		$207,051.03
Correct income-tax liability		$207,051.03
Income tax assessed:		
Original, account #200200	$142,150.10	
Additional, May 29, 1936, page 1, line 2, #5	29,219.11	
April 2, 1937, page 1, line 1, #1	1,803.21	
		173,172.42
Deficiency of income tax		$33,878.61

23

IT: C: 1
N: P: 90D

Exhibit A

Mr. Richard J. Reynolds—1934

1	2 Security	3 Rate	4 Due	5 Date of purchase	6 Cost to trust	7 Date of sale by trust	8 Sale price by trust	9 Date of repurchase by trust	10 Repurchase price by trust	11 Date of sale by R. J. Reynolds	12 Sale by R. J. Reynolds	13 Adjusted cost to R. J. Reynolds		14 Gain or loss	15	16 Net gain or loss
$30,000.00	City of Phila.	4¼	1979	Jan. 3, 1930	$30,112.50	Aug. 31, 1932	$25,697.36					$30,112.50				
30,000.00	do	4¼	1976					Aug. 31, 1932	$25,923.30	May 3, 1934	$30,225.00	225.94	$30,338.44	($113.44)	60%	($68.08)
245,000.00	do	4	1981	Mar. 6, 1931	144,833.75	Oct. 21, 1932						144,833.75				
245,000.00	do	4½	1976	Mar. 7, 1931	25,062.50		199,274.53	Oct. 21, 1932	212,436.00	May 3, 1934	246,837.50	25,062.50				
50,000.00	do	4	1981	Mar. 10, 1931	124,687.50	Oct. 14, 1932	41,250.00					124,687.50				
50,000.00	do	4	1980					Oct. 14, 1932	41,500.02	May 5, 1934	49,500.00	13,411.49	307,995.24	(11,657.74)	60%	(6,994.64)
55,000.00	do	4	1978	1928		Dec. 21, 1932	43,852.50					373,452.50				
55,000.00	do	4	1975					Dec. 21, 1932	44,000.00	May 5, 1934	54,450.00	137.50				
12,000.00	do	4	1978	1928		Dec. 27, 1932	9,610.00									
12,000.00	do	4	1975		373,452.50			Dec. 27, 1932	9,670.00	May 5, 1934	11,880.00	60.00				
200,000.00	do	4	1976	1928		Dec. 21, 1932	180,000.00									
200,000.00	do	4	1981					Dec. 21, 1932	161,000.00	May 5, 1934	198,000.00	1,000.00				
100,000.00	do	4	1978	1928		Dec. 22, 1932	80,000.00									
100,000.00	do	4	1981					Dec. 22, 1932	80,600.00	May 5, 1934	99,000.00	500.00	375,150.00	(11,820.00)	40%	(4,728.00)
[a] 55,000.00	do	4	1953					Dec. 13, 1932	46,406.25	May 5, 1934	54,450.00	No adjustment necessary		8,043.75	80%	6,435.00
[b] 45,000.00	do	4	1953					Dec. 28, 1932	37,575.00	May 5, 1934	44,550.00			6,975.00	80%	5,580.00
	Total															224.30

Columns 1 to 10, inclusive, include the original purchase by the trust and the sale and repurchase of a similar security on which the loss was disallowed in the examination of the trust return for the year 1932.

Columns 11 to 16, inclusive, include the transactions after the stock was distributed by the trust company to R. J. Reynolds.

Column 13 is computed by adding the original cost to the trust (column 6) to the loss disallowed in the examination of the trust return for 1932 (column 10 minus column 8).

([a]), ([b]). The loss claimed on the original securities acquired by the trust and sold in 1932 was allowed in the final determination of the tax liability for the year 1932; therefore, the cost to R. J. Reynolds is the cost of the securities repurchased by the trust.

24

Exhibit B to petition

WILL OF R. J. REYNOLDS

In the name of God, Amen: I, Richard Joshua Reynolds, of Winston-Salem, North Carolina, being of sound mind and disposing memory, and realizing the uncertainty of life, do make, publish, and declare my last Will and Testament to be as follows:

* * * * *

ITEM FOURTH

All the rest, residue, and remainder of my estate of every kind, character, and description, real, personal, and mixed, and wheresoever, situated, I direct shall be divided by my executor, said Safe Deposit & Trust Company, between and among my wife and children living at my death, or thereafter born, and the living issue of any deceased child, per stirpes; that is, one-third (1-3) thereof to my wife absolutely (except one-third (1-3) of my common capital stock in R. J. Reynolds Tobacco Company which is subject to the terms of trust later herein created), and two-thirds (2-3) thereof to my children and the living issue of any deceased child, per stirpes; to be equally divided among them, share and share alike (the living issue of any deceased child to take such child's part). But Subject to the Following Trust, namely: I give, devise, and bequeath my wife's one-third (1-3) share of my common capital stock in R. J. Reynolds Tobacco Company and my children's shares in my entire estate (except the gift in Item First to my oldest living child which shall not be subject to this trust and which shall be in addition to such child's equal share of the residue of my estate), to the Safe Deposit & Trust Company of Baltimore, Trustee, to hold, dispose of, and distribute upon the following terms and conditions, to wit:

(1) Said Trustee will collect the income from my wife's one-third of my common capital stock in R. J. Reynolds Tobacco Company and, as collected, pay the net proceeds thereof over to her during the existence, or running, of the trusts, or any of them, created for her benefit and the benefit of my children by this Item Fourth of my last Will and Testament. At the termination of said trusts, said Trustee will turn over said stock to her absolutely, and it will likewise turn over to her the proceeds of any sale of said stock that may be made, during her life, pursuant to the sale provisions of this Item of my Will.

(2) Should my wife die testate before the termination of said trusts, then her share of my said common stock in R. J. Reynolds Tobacco Company shall continue to be held on like terms by said

Trustee for the use and benefit of her devises by Will until the termination of said trusts when said stock shall be disposed of as she may by Will direct, except that the income from any part, or parts, thereof that she may give to our children, or the living children of any deceased child, shall become a part of the trust estate herein created for their benefit and to be held and disposed of by said Trustee in accordance with the terms of this trust.

25 (3) And should my wife die before the termination of said trusts, intestate, or without making a Will, then the one-third of my common stock in R. J. Reynolds Tobacco Company herein devised to her in trust shall also become a part of the trust estate herein created for the benefit of my children, and shall be held and disposed of by my said Trustee in accordance with the terms and provisions of this trust.

(4) Said Safe Deposit & Trust Company, Trustee, is also authorized and directed to collect, for their equal benefit, all the income arising from my children's shares of my estate, and, until they severally arrive at the age of twenty-one (21) years, to pay to my wife, out of their respective shares, so much of said income as she may deem necessary or requisite for the support, maintenance, and education of each (of) them. Should my wife die before any one of my children shall have arrived at twenty-one (21) years of age, then said Trustee is authorized and directed to use its own discretion as to the amount to be paid in the support, maintenance, and education of each of my said children until they respectively reach their majority.

(5) From and after each of my said children shall arrive at the age of twenty-one (21) years and until they respectively attain the age of twenty-eight (28) years, said Trustee is authorized and directed to pay to each of them out of his or her respective share of said income, the sum of Five Thousand Dollars ($5,000) per annum, unless, in the opinion of my wife, that amount shall be inadequate to meet the annual requirements of any one or more of my said children. In that event, and at the written request of my said wife, said Trustee is authorized and directed to enlarge said annual payment of Five Thousand Dollars ($5,000) by whatever amount my wife sees fit to designate, provided the total annual allowance does not exceed Fifty Thousand Dollars ($50,000). Should my wife die while any of my children are between the ages of twenty-one (21) and twenty-eight (28) years, then, from and after her death, said Trustee will pay to each of my said children, out of his or her share of my estate, and provided he or she shall have arrived at the age of twenty-one (21) years, Fifty Thousand Dollars ($50,000) per annum, and is directed to accumulate all the

balance of said income for his or her respective use and benefit until he or she shall respectively attain the age of twenty-eight (28) years, when each of them shall become entitled to and shall respectively receive from said Trustee his or her share of the corpus of my estate, together with the accumulated income aforesaid.

(6) To encourage habits of industry, thrift, and economy in my children, I hereby make the following provision for further payments to them after they reach the age of twenty-one (21) years, and before they attain the age of twenty-eight (28) years, to wit: I direct said Trustee, Safe Deposit & Trust Company, annually, upon any of my children presenting to it a statement showing to said Trustee's satisfaction that he or she has made
26 by individual effort, in any legitimate business or investment or has saved from money, stocks, or bonds owned by him or her, any money over and above all living expenses, to pay to such child, out of his or her share of my estate, if necessary to the full extent of such share, two dollars for every one dollar so made or saved. Payment will be made in cash; or, if the child entitled thereto so elects, in stocks or bonds at par, including stocks in R. J. Reynolds Tobacco Company (subject to sale restrictions as to last named stocks as shown in Item Fifth hereof). But, said Trustee is directed to exclude and eliminate from any annual statement submitted under this provision of my Will any money made in buying and selling stocks or commodities of any kind, on margin (commonly known as dealing in "futures"), or earnings or profits derived from speculation of that character. Any married daughter may avail herself of this provision of my Will and may, in filing annual statements as herein required and subject to the same restrictions, include therein like earnings and savings, over and above expenses, by her husband.

(7) Should any of my children die before he or she shall arrive at the age of twenty-eight (28) years, then the share of my estate which would have been payable to him or her, had he or she arrived at that age, shall be continued to be held by my said Trustee for the use and benefit of his or her devisees by Will until the time that such child would have arrived at the age of twenty-eight years, if he or she had lived, when the said trust shall cease and the estate shall then become payable to such devisees, the Trustee, however, paying in the meanwhile the income from said share to them; but should any of my children die before that time without having disposed of his or her share by Will but leaving issue him or her surviving, the share of said deceased child shall continue to be held by said Trustee for the use and benefit of his or her children living at his or her death, paying unto them or applying so much of the net income of the share of my child so dieing as said Trustee may deem necessary for their support and

maintenance and accumulating the balance until the time my child so dieing would have arrived at the age of twenty-eight years, if he or she had lived, when the trust shall cease and the estate shall then become vested in his or her children then surviving; and, should any of my said children die without having made a testamentary disposition of his or her share of my said estate and without issue living at the termination of said trust, then his or her share shall be held on like trusts for my surviving children and the then living issue of my deceased children per stirpes; and, should all of my children and their issue die before the termination of the trusts, then, in that event, one-half of the trust estate in value at that time, principal and income, shall go to and belong to my said wife, and the other half to my brothers and sisters then living and the descendants then living of any of my deceased brothers and sisters, per stirpes.

27 (8) Said Trustee is hereby authorized, with the assent of my wife, if she is living, and, after her death, in its own discretion, to sell any part of my estate, real or personal, and it is empowered to make all necessary transfers and conveyances, at any time it may be to her best interest and to the best interest of my children to do so; but my common capital stock in R. J. Reynolds Tobacco Company shall in no case be sold per share during the existence of any of the trusts herein created for the benefit of my wife and children at a price less than that which will represent a 10 per cent investment based on the average net profits of R. J. Reynolds Tobacco Company for the three fiscal years next preceding the date of sale as will appear from the books of the Company at the close of business for these years, and all proceeds from any and all sales, or any part of my estate, real or personal, as well as all earnings from my estate, shall only be invested in bonds of the United States, of the States of the Union, of the various municipalities thereof, separately or collectively, or in such proportion of any new issue, or issues, of stocks or bonds, of R. J. Reynolds Tobacco Company, as my Trustee's holdings therein may entitle it to take, under any offer to stockholders thereof, and, at the termination of the trusts, or any of them, my Trustee is hereby authorized to divide my estate in kind so far as the same may, in its judgment, be capable of division, and to sell any portion of said trust estate for the purpose of division, if it deems the same necessary, and in every case of sale to execute to the purchasers good and sufficient deeds and transfers without obligation to them to see the application of the purchase money.

ITEM FIFTH

It is my will and desire that all gifts and bequests of my common capital stock in R. J. Reynolds Tobacco Company, made in

this my last Will and Testament, are upon condition that such stock shall not be sold by anyone who shall receive it, during the life of any of the trusts herein created for the benefit of my wife and children, at a price less than that which will represent a 10 per cent investment, based on the average net profits of R. J. Reynolds Tobacco Company for the three fiscal years next preceding the date of sale, as may appear from the books of the Company at the close of business for these years.

* * * * *

ITEM SEVENTH

I hereby nominate, constitute, and appoint my wife, Katherine Smith Reynolds, Executrix, hereunder of that portion of my estate which may be situate in North Carolina at the time of my death, and I direct that she shall be exempt from the necessity of giving bond as such and that she be not required to file in the Clerk's Office any inventory or account, but in lieu thereof
28 file with the Safe Deposit & Trust Company an inventory
and account, under oath, of the amount of property received by her, and of her disbursements, including distributions made by her of my estate there situate, furnishing therewith, if required, proper vouchers covering all payments.

As soon after my death as convenient, I direct my said Executrix to pass over, transfer and deliver any of my estate located in the State of North Carolina to those who are entitled to the same under the provisions of this Will, turning over to said Safe Deposit & Trust Company of Baltimore, Trustee, the portion of my estate for the benefit of my said children.

I hereby nominate, constitute and appoint the Safe Deposit & Trust Company of Baltimore Executor hereunder of all my estate outside of the State of North Carolina, and I direct it to take into custody all of my said estate (except that located in the State of North Carolina) and to make distribution thereof to the devisees hereunder direct according to the provisions of this Will, and I confer upon my said Executrix and Executor respectively full power and authority to do and perform all acts necessary to enable them to settle my estate and make effective and carry out the provisions of this Will.

ITEM EIGHTH

I hereby provide that all payments to be made hereunder to my beneficiaries shall be into their own hands and not into the hands of others, whether claiming by their authority or otherwise.

* * * * *

ITEM ELEVENTH

I hereby direct, authorize and empower my wife, Katherine S. Reynolds, and my brother, William N. Reynolds, or the survivor of them, from time to time to appoint, or substitute, a new Trustee or Trustees of this my last Will and Testament, if my Trustee herein appointed, or if its successor or successors, shall refuse to serve, cease to exist, become incapacitated, or resign, or, if, in the judgment of my wife and brother, or in the judgment of the survivor of them, it shall be for the best interest of my estate to substitute and appoint another or other Trustees in the place of the then Trustee, or Trustees. The appointment or substitution above provided for shall be made by a written instrument, under seal, duly acknowledged and recorded and filed with the proper keeper of records where required to be filed. Thereupon, and so often as any new Trustee, or Trustees, shall be substituted or appointed, as aforesaid, all the property, real, personal and mixed of every nature and kind whatsoever and wheresoever situated, which shall be held upon the trusts herein created, shall be conveyed, assigned and transferred, respectively, in such manner that the same shall become legally and effectually vested in the new Trustee or Trustees, who shall thenceforth be competent to act in the execution of
29 the trusts herein created, as fully and effectually with all the same powers and authorities, and subject to all the conditions and restrictions, to all intents and purposes whatsoever, as if originally appointed herein.

ITEM TWELFTH

I hereby expressly revoke all Wills heretofore at any time made by me.

In witness whereof, I have hereunto subscribed my name and affixed my seal this 25th day of July, 1917.

R. J. Reynolds. [seal.]

Signed, Sealed, Published, and Declared by Richard Joshua Reynolds, the above named Testator, as and for his last Will and Testament in the presence of us, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereto.

D. Rich.
Geo. W. Orr.
H. H. Shelton.

30 Before United States Board of Tax Appeals

[Title omitted.]
[File endorsement omitted.]

Answer

Filed July 26, 1938

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5. (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) Admits that R. J. Reynolds (senior) died, leaving a last will and testament which was duly admitted to probate and administered in accordance with its terms. Denies all other
31 material allegations of fact contained in subparagraph (b) of paragraph 5 of the petition.

(c) Admits that in his said last will and testament the decedent devised and bequeathed a portion of his estate to the Safe Deposit & Trust Company of Baltimore, Maryland, as Trustee, for the benefit of the decedent's children. Denies all other material allegations of fact contained in subparagraph (c) of paragraph 5 of the petition.

(d) Denies the material allegations of fact contained in subparagraph (d) of paragraph 5 of the petition herein.

(e), (f), and (g) Denies the material allegations of fact contained in subparagraphs (e), (f), and (g) of paragraph 5 of the petition herein.

(h) Admits that the petitioner attained the age of twenty-eight years on April 4, 1934. Denies all other material allegations of fact contained in subparagraph (h) of paragraph 5 of the petition herein.

(i), (j), (k), (l), (m), and (n) Denies the material allegations of fact contained in subparagraphs (i), (j), (k), (l), (m), and (n) of paragraph 5 of the petition herein.

(o) Admits the petitioner attained the age of twenty-eight years on April 4, 1934. Denies all other material allegations of fact contained in subparagraph (o) of paragraph 5 of the petition herein.

(p) Admits that in accordance with the authority and direction contained in the trust instrument the trustees transferred, delivered and distributed to petitioner a certain portion of the
32 assets comprising the corpus of the trust, among which were certain stocks and securities. Denies all other material allegations of fact contained in subparagraph (p) of paragraph 5 of the petition herein.

(q) Admits that in the said year 1934 the petitioner sold certain of the said stocks and securities. Denies all other material allegations of fact contained in subparagraph (p) of paragraph 5 of the petition herein.

(r) Admits that in his income tax return for the year 1934, petitioner reported the said sales made by him and in computing the gains and losses arising upon said sales the petitioner used as the basis or cost thereof the fair market value of said property on April 4, 1934, and reported his taxable income accordingly. Denies all other material allegations of fact contained in subparagraph (r) of paragraph 5 of the petition herein.

(s) Admits that the respondent has determined that the basis to be used by petitioner in computing his gains and losses on said sales is as set forth in respondent's notice of deficiency attached to the petition herein as Exhibit A. Denies all other material allegations of fact contained in subparagraph (s) of paragraph 5 of the petition herein.

(t), (u), and (v). Denies the material allegations of fact contained in subparagraphs (t), (u), and (v) of paragraph 5 of the petition herein.

Denies generally and specifically each and every allegation contained in the petition not hereinabove admitted, qualified, or denied.

33 Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount designated by the Commissioner, viz., $33,873.61.

J. P. Wenchel,
G. W. K.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
F. R. Shearer,
D. A. Taylor,
Special Attorneys,
Bureau of Internal Revenue.

DAT/BF. 7-22-38.

34 Before United States Board of Tax Appeals

[Title omitted.]

Stipulation of facts

Filed April 12, 1939

It is hereby stipulated by and between the above named petitioner and the Commissioner of Internal Revenue, through their respective attorneys, that the following facts are true and that the Board may incorporate the same into its findings of fact, subject to the right of either party to introduce additional evidence not inconsistent herewith.

1. The petitioner is a citizen of the State of North Carolina and resides in the County of Forsyth within said State. Petitioner is the son of R. J. Reynolds, deceased, and was born in Forsyth County, North Carolina, on April 4, 1906.

2. R. J. Reynolds (senior), father of the petitioner, died testate on July 19, 1918, leaving four infant children surviving him. Petitioner was the oldest of said four children.

3. R. J. Reynolds (senior) died leaving a last will and testament, copy of which is contained in the volume filed with this stipulation as Exhibit A hereof, and by such reference made a part of this stipulation.

4. Safe Deposit & Trust Company, a banking and trust corporation of the City of Baltimore, was designated by the decedent, R. J. Reynolds (senior) as the Trustee of the Trust
35 created by said will (in "ITEM FOURTH" thereof) for the benefit of the instant petitioner and others; and on the 3rd day of August, 1926, the said Safe Deposit & Trust Company as Trustee received and took over the assets of the Trust, from the Estate of R. J. Reynolds, deceased, in accordance with the terms of the said last will and testament of said R. J. Reynolds, deceased; and thereafter as such Trustee administered the Trust and the assets thereof in accordance with the terms of said Trust; and continues so to administer the said Trust to the present date for the benefit of certain of the beneficiaries of said Trust other than the instant petitioner.

5. Petitioner attained the age of twenty-eight (28) years on April 4, 1934, and on said date became entitled to a portion of the trust corpus together with certain accumulated income arising from the Trust, as provided in the said last will and testament of said R. J. Reynolds, deceased.

6. On the said date (April 4, 1934) the Trustee, Safe Deposit & Trust Company, acting in accordance with the authority and directions of the trust instrument, transferred, delivered, and dis-

tributed to petitioner the portion of the assets of the Trust to which petitioner became entitled on that date, as aforesaid, and on said date the petitioner acquired the said portion of the assets of the Trust to which he became entitled on that date.

7. Among the assets to which petitioner became entitled on April 4, 1934, and on which said date said assets were distributed to, and acquired by, petitioner, were certain securities which petitioner sold within the year 1934, on a date or dates subse-
36 quent to April 4, 1934. In his income tax return for the year 1934, the petitioner computed and reported his profits and losses (arising upon such said sales) by comparing the sales price received by him with the fair market value of the said securities (so sold by petitioner as aforesaid) on the date the said securities were acquired by petitioner upon their distribution to him by the Trustee, as aforesaid, to-wit, April 4, 1934.

8. Included in the securities so distributed to petitioner and acquired by him on April 4, 1934, as aforesaid, were certain bonds which had been purchased by the Trustee (Safe Deposit & Trust Co.) at various dates subsequent to the death of R. J. Reynolds, deceased, but prior to April 4, 1934. It is agreed that if the basic date for computing the capital gains realized, or capital losses sustained, is April 4, 1934, then there is no deficiency arising upon the item numbered (1) on page 2 of the statutory deficiency noted; but that if the basic date for computing the capital gains realized, or capital losses sustained, is as determined by the Commissioner in his statutory notice of deficiency, then the taxable income of petitioner under this item should be increased by the amount of $31,811.84.

9. Included in the securities so distributed to petitioner and acquired by him on April 4, 1934, as set out above herein, were one thousand (1,000) shares of R. J. Reynolds Tobacco Co. Class "B" common stock. The said shares constituted a portion of the shares of such said stock owned by decedent, R. J. Reynolds, at the date of his death. It is agreed that if the basic date for computing the capital gains realized, or capital losses sustained, is April
37 4, 1934, then there is no deficiency arising upon the item numbered (2) on page 2 of the statutory deficiency notice; but that if the basic date for computing the capital gains realized, or capital losses sustained, is as determined by the Commissioner in his statutory notice of deficiency, then the taxable income of petitioner under this item should be increased by the amount of $7,899.09.

10. Included in the securities so distributed to petitioner and acquired by him on April 4, 1934, as set out above herein, were certain bonds which had been purchased by the Trustee at various dates subsequent to the death of R. J. Reynolds, deceased, but

prior to April 4, 1934. It is agreed that if the basic date for computing the capital gains realized, or capital losses sustained, is April 4, 1934, then there is no deficiency arising upon the item numbered (3) on page 2 of the statutory deficiency notice; but that if the basic date for computing the capital gains realized, or capital losses sustained, is as determined by the Commissioner in his statutory notice of deficiency, then the taxable income of petitioner under this item should be increased by the amount of $21,316.90.

11. By reason of the action taken by the Commissioner, as set out in the statutory deficiency notice in this cause, the Commissioner increased petitioner's net taxable income by the amount of $61,027.63 and computed thereon a deficiency in income tax. The said action of the Commissioner in respect of the said amount of $61,027.63 constitutes the sole controversy between the parties in this cause. It is agreed that if the basic date for determining capital gains or losses is April 4, 1934, as contended by the
38 petitioner, then there is no deficiency whatsoever in this
cause; but that if the basic date for computing the capital gains or lossess is as determined by the Commissioner in his statutory deficiency notice, then the deficiency of $33,878.61, as computed by the Commissioner in his statutory deficiency notice, is correct.

12. One son of the testator (to wit, Zachary Smith Reynolds) died on July 6, 1932. The said Zachary Smith Reynolds was the brother of petitioner and under the Trust created by said R. J. Reynolds, deceased, in his last will and testament (referred to hereinabove) the said Zachary Smith Reynolds was a beneficiary under the same terms and provisions of the said Trust as those relating to the petitioner herein.

13. Filed with this stipulation, and identified by the signatures of counsel for the parties are two duplicate printed volumes entitled:

No. 760. Eleventh District. Supreme Court of North Carolina. Spring Term 1935. Anne Cannon Reynolds, et al. against Zachary Smith Reynolds, et al. (filed with this stipulation as Exhibit A hereof) and two duplicate printed volumes entitled: Part of Record and Proceeding in the Supreme Court of Forsyth County and in the Supreme Court of North Carolina In a Civil Action Entitled: Anne Cannon Reynolds, et al. vs. Zachary Smith Reynolds, et al. (filed with this stipulation as Exhibit B hereof).

39 It is stipulated and agreed that said copies are true and
full copies of the proceedings in said case, and that the several wills, deeds of trust, grants and letters and other papers and documents of which copies appear in the said printed volumes (exhibits A and B filed herewith) are true copies; and that, in so far as the said record or proceedings or any of the said papers and documents may be admissible or relevant in the trial of the instant

proceeding, it shall not be necessary to prove the same by certified copies or otherwise; but that the copies of said record and proceeding and all the papers and documents appearing therein (Exhibits A and B filed herewith) shall be deemed sufficient proof thereof.

(s) J. G. KORNER, Jr.,
J. G. Korner, Jr.,
(s) H. G. HUDSON,
H. G. Hudson,
(s) STRATTON COYNER,
Stratton Coyner,
Transportation Building, Washington, D. C.,
Counsel for petitioner.
(s) J. P. WENCHEL,
J. P. Wenchel,
Counsel for respondent.

FEBRUARY 28, 1939.

40 Before United States Board of Tax Appeals

[Title omitted.]
[File endorsement omitted.]

Submission under rule 30

Filed April 12, 1939

J. G. Koerner, Jr., Esq., for the petitioner.
R. H. Transue, Esq., for the respondent.

The above case is hereby submitted under Rule 30 of the Board of Tax Appeals on the filing herewith of a Stipulation of Facts, accompanied by certain exhibits referred to in the stipulation.

J. G. KORNER,
Attorney for the Petitioner.
J. P. WENCHEL,
Attorney for the Respondent.
By R. H. TRANSUE.

41 Before United States Board of Tax Appeals

RICHARD J. REYNOLDS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 94108. Promulgated January 10, 1940

Under a will of 1918 providing that the testator's children should receive shares of trust corpus upon reaching a certain age, one of

the children upon his birthday in 1934 received securities from the trustee and sold them in that year. Held, the basis for gain or loss, Revenue Act of 1934, section 113 (a) (5), was the fair market value on the date of the death of the testator.

J. G. Korner, Jr., Esq., for the petitioner.

Rollin H. Transue, Esq., for the respondent.

Opinion

STERNHAGEN: The Commissioner determined a deficiency of $33,878.61 in petitioner's income tax for 1934, resulting from the use of a lower basis than that used by petitioner in computing the capital gain derived from the sale of securities. The case is submitted under Rule 30 upon a written stipulation.

Petitioner's father died July 19, 1918, and by his will two-thirds of the residue of his estate was left in trust. The trustee was directed to pay the widow enough of the income to maintain the children until each became twenty-one, then to pay each child $5,000 or more a year until he became twenty-eight, "when each of them shall become entitled to and shall respectively receive * * * a share of the corpus, together with the accumulated income." Provision was made for distribution in case a child should die before becoming twenty-eight.

The trustee received the trust assets from the estate in 1926 and distributed the proper share of them, including securities, to petitioner on April 4, 1934, when he became twenty-eight. Some of the securities so distributed had been received by the trustee from the decedent's estate and others had been acquired by the trustee in intermediate transactions. Petitioner sold some of the securities during the year at a profit. In computing gain, he used as basis the value on April 4, 1934, when he received them from the
42 trustee. The Commissioner, however, used as basis the lower
value of the securities at the time of the father's death in the case of those then held by the father, and their cost to the trustee in the case of those which it had acquired thereafter. The decision turns upon the Revenue Act of 1934, section 113 (a) (5): "If the property was acquired by bequest * * * the basis should be the fair market value of such property at the time of such acquisition."

The petitioner did no doubt receive the very securities only when they were distributed to him in 1934. The question is whether time of such receipt is what the statute means as the "time of acquisition." That question must be decided primarily with regard for the fulfillment of the purpose of the statute and not only with regard for the generally accepted meaning of the particular phrase. This was the reasoning of Brewster v. Gage, 280 U. S. 327. In point of fact the direct legatee in that case did not receive the

bequeathed property before the distribution of the decedent's estate, but the Court held that nevertheless the statutory time of acquisition was the date of decedent's death.

The intendment of the statute requires the same construction here. The intervention of the fiduciary administering the trust involves quite the same difficulties under this very statutory subsection as did the intervention of the fiduciary administering the decedent's estate. As to both, the dominant legislative purpose was to prescribe a basis which would result in taxing the increment in value of the property upon the occasion of its realization. It is plain that such purpose which was promoted only by judicial construction in Brewster v. Gage, supra, as to bequests delayed by administration and distribution of the estate, would be defeated as to bequests delayed by intervening trusts if the same reasoning were not applied. Elizabeth G. Augustus, 40 B. T. A. — (Dec. 20, 1939).

Petitioner argues that the phrase "time of acquisition" must be construed with regard to whether the interest bestowed upon him by the will was a vested or contingent interest; that if a contingent interest it may not be regarded as acquisition of the property, and that by North Carolina law (Reynolds v. Reynolds, 208 N. C. 578; 182 S. E. 341) his interest was a contingent interest until he received the securities by distribution. The argument must be rejected because the proper application of the statute is not dependent upon whether the interest created in petitioner by the trust was but a contingent interest. Elizabeth G. Augustus, supra; Richard Archbold et al., 40 B. T. A.—(Dec. 22, 1939). Even if it was contingent, the intendment of the statute was that the securities actually received when distributed are to be regarded as putatively acquired by the beneficiary when the testator died, if their identity
43 has been preserved, or when the trustee acquired them by
purchase or exchange if the original securities have been disposed of in such an intermediate transaction. The basis of the beneficiary is, therefore, the value at the date of the testator's death as to the securities left by the testator and received by the petitioner, and the basis of the trustee as to the securities acquired by the trustee by purchase or exchange.

Reviewed by the Board.

Decision will be entered for the respondent.

Van Fossan dissents.

Concurring opinion

Disney, concurring: I concur in the result. I think that the estate created by the testator for his children was vested, and that opinion should be placed upon that ground. The will recites,

under "Item Fourth," that the residue of the testator's estate should be divided one-third to his wife "and two-thirds (⅔) thereof to my children and the living issue of any deceased child, per stirpes, to be equally divided among them, share and share alike." It is true that it is subject to a trust, but the statement of the trust itself refers to "my children's shares in my entire estate"; also refers to "the trust estate herein created for their benefit"; and "the trust estate herein created for the benefit of my children." Later, we find the expression, referring to the children, "out of their respective shares"; also "said trustee will pay to each of my said children, out of his or her share of my estate, and provided he or she shall have arrived at the age of twenty-one (21) years, Fifty Thousand Dollars ($50,000) per annum." Particularly, however, and immediately following the language last quoted, I note the language "and is directed to accumulate all the balance of said income for his or her respective use and benefit until he or she shall respectively attain the age of twenty-eight (28) years, when each of them shall become entitled to and shall respectively receive from said Trustee his or her share of the corpus of my estate, together with the accumulated income aforesaid." In my opinion, this language, taken together with the other expressions above quoted, must be construed as a statement as to when the devise, vested at the time of death, should be payable. Such an estate is vested and not contingent. Inasmuch as this matter arose in the State of North Carolina and inasmuch as the majority opinion recites petitioner as relying in part upon the fact of a decision by the Supreme Court of that state in Reynolds v. Reynolds, 208 N. C. 578; 182 S. E. 341, as a determinative ruling, I note the opinion of that court in Hooker v. Bryan, 140 N. C. 402, 53 S. E. 130, holding as follows:

"Testatrix devised the residue of her real estate to H. "upon his becoming 21 years of age," and lent the same to her sister
44 until such event. She also lent to such sister her personal property, in trust for H. until he became 21 years of age. Held, that the clause "upon his becoming 21 years of age" should be construed merely to postpone the enjoyment of the estate, which was a remainder vesting in H. from the date of testatrix's death."

In Vanderwarker's Estate, 81 Minn. 197, 83 N. W. 538, a legacy was provided in terms not dissimilar to those involved herein: Five thousand dollars was given, devised and bequeathed to executors in trust, for a grandchild of testator, to be loaned, the interest added to principal until the granddaughter arrived at the age of 21 years, at which time all interest should be paid to her, and the interest thereafter likewise paid to her "until she arrives at the age of thirty years, when I direct my said executors to pay to my said granddaughter * * * the said five thousand

dollars." Held, the granddaughter had a vested estate, which descended upon her death before receipt, to her heirs.

45 Before United States Board of Tax Appeals, Washington

Docket No. 94108

RICHARD J. REYNOLDS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

In accordance with the Board's report, promulgated January 10, 1940, it is

Ordered and decided that there is a deficiency of $33,878.61 in income tax for 1934.

Enter:

Entered Jan. 11, 1940.

[SEAL] (S) J. M. STERNHAGEN, *Member.*

46 In United States Circuit Court of Appeals for the Fourth Circuit

Petition for review

Filed March 25, 1940

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

Richard J. Reynolds, the petitioner, in support of this, his petition, filed pursuant to the provisions of sections 1001, 1002, and 1003 of the Act of Congress entitled the Revenue Act of 1926 (as amended by section 1101 of the Revenue Act of 1932, and section 519 of the Revenue Act of 1934), for the review of the decision of the Board of Tax Appeals rendered the 11th day of January, 1940, determining and ordering a deficiency in income tax of petitioner, in the amount of $33,878.61, shows to the Court as follows:

I

On March 11, 1938, the Commissioner mailed to petitioner a Notice of Deficiency, advising petitioner that he had determined a deficiency in income tax for the calendar year 1934, in the amount of $33,878.61.

In his said Notice of Deficiency the Commissioner advised petitioner that the proposed additional income tax of $33,878.61 resulted from the Commissioner's action in adding $61,027.63 to petitioner's net income, which said amount the Commissioner claimed represented a capital net gain realized by petitioner on the sale in
47 1934 by petitioner of certain securities. The said securities had been distributed to, and acquired by, the petitioner on April 4, 1934, on which said date petitioner became entitled to receive, and did receive, said securities from Safe Deposit and Trust Company, Trustee of a certain testamentary trust created by the will of petitioner's father who died testate on July 19, 1918.

On June 3, 1938, petitioner filed an appeal from said Deficiency Notice, in the Board of Tax Appeals.

On July 26, 1938, respondent filed his answer in the Board.

The cause came on for hearing in the Board on April 12, 1939, and was at that time submitted by the parties upon the pleadings and a written stipulation accompanied by certain exhibits, which was duly filed at that time.

Upon the record as submitted, the sole issue for determination by the Board was: Whether in 1934 petitioner realized a taxable profit of $61,027.63 on his sale in 1934 of certain securities acquired by him earlier in 1934 (to-wit, on April 4, 1934) from Safe Deposit and Trust Company, under the facts and circumstances disclosed by the record.

Thereafter, on January 10, 1940, the Board promulgated findings of fact and an opinion in which it was held and decided that petitioner had realized a taxable profit in 1934 of $61,027.63, by reason of the sale of said securities.

On January 11, 1940, the Board entered a decision, ordering that there is a deficiency in income tax in the amount of $33,878.61, for the year 1934.

48

II

The nature of the controversy, is as follows: R. J. Reynolds (Senior), father of the petitioner, died testate on July 19, 1918, leaving four infant children surviving him. Petitioner was the oldest of said children. In his last will and testament Mr. Reynolds created identical testamentary trusts for each of his four children. The salient portions of the will creating the trusts are as follows:

1. The Trustee was to apply such of the income as was deemed necessary for the support, maintenance and education of each child until such child became 21 years of age.

2. From the date each child became 21 years of age, and until he attained the age of 28 years, the Trustee was to pay such child an annual income of not less than $5,000 and not more than $50,000.

3. To accumulate all the balance of the trust income for the respective use of each child "until he or she shall respectively attain the age of twenty-eight (28) years, when each of them shall become entitled to and shall respectively receive from said Trustee his or her share of the corpus."

4. "Should any of my children die before he or she shall arrive at the age of twenty-eight (28) years, then the share of my estate which would have been payable to him or her, had he or she arrived at that age, shall be continued to be held by my said Trustee * * *."

5. In the event a child did not live to the age of 28, the Trustee was to continue to hold the trust for the benefit of a devisee of such child until the date such child would have reached 28,
49 if he had lived that long, at which time the trust should terminate and be payable to such devisee.

6. In the event a child did not live to the age of 28, and died intestate, leaving issue, the Trustee was to continue the trust for the benefit of such issue until the date that such child would have reached 28, if he had lived that long, at which time "the trust shall cease and the estate shall become vested" in such issue as may be living at such date.

7. The will provided that all payments to be made to the beneficiaries "shall be into their own hands and not into the hands of others, whether claiming by their authority or otherwise."

The will appointed Safe Deposit and Trust Company of Baltimore the Trustee of the trust. Said Trustee received and took over the assets of the trust from the estate of the decedent and thereafter administered the trust and the assets thereof in accordance with the terms of the said trust.

Petitioner was the oldest of the four children of the decedent and was 12 years of age when his father died. Petitioner attained the age of 28 on April 4, 1934, and on said date his interest in the trust was vested and he became entitled to a portion of the trust corpus, together with certain accumulated income arising from the trust, as provided in the last will and testament of his father. On the said date (April 4, 1934) the Trustee acting in accordance with the authority and directions of the trust instrument, terminated, delivered and distributed to petitioner the portion of the assets of the trust which vested in petitioner on that day and to which he became entitled on that day; and on said day the petitioner acquired the said portion of the assets of the trust to which he became entitled on that date.

50 Included in the assets so distributed to petitioner and acquired by him on April 4, 1934, were certain bonds which had been purchased by the Trustee at various dates subsequent to the death of R. J. Reynolds, deceased, but prior to April 4, 1934.

Included in the securities so distributed to petitioner and acquired by him on April 4, 1934, were 1,000 shares of R. J. Reynolds Tobacco Co. Class "B" common stock. These said shares constituted a portion of the shares of such said stock owned by the decedent R. J. Reynolds at the time of his death.

Among the assets to which petitioner became entitled on April 4, 1934, and on which said date said assets were distributed to, and acquired by, petitioner, were certain securities which petitioner sold within the year 1934, on a date or dates subsequent to April 4, 1934. In his income tax return for the year 1934, the petitioner computed and reported his profits and losses (arising upon such said sales) by comparing the sales price received by him with the fair market value of said securities (so sold by petitioner as aforesaid) on the date the said securities were acquired by petitioner upon their distribution to him by the Trustee as aforesaid, to wit, April 4, 1934.

The Commissioner disallowed the action of the petitioner in computing his profits and losses as above set out; and recomputed the profits and losses of the petitioner on the sale of said securities, (1) by comparing the sales price of the stock with the value of that said stock on the date of the death of R. J. Reynolds, deceased, and (2) by comparing the sales price of the bonds with the price which the Trustee had paid for these bonds when they were purchased by the Trustee. By this action the Commissioner reduced the "basis" for computing petitioner's gain or loss and thereby increased the profits realized by petitioner on the sale of said stock and
51 bonds by the amount of $61,027.63; which said amount the Commissioner added to petitioner's net income.

The tax result of the addition of $61,027.63 to petitioner's net income is a deficiency in the amount of $33,878.61, as computed by the Commissioner in his statutory deficiency notice.

The addition by the Commissioner of $61,027.63 to petitioner's net income constitutes the sole issue in this cause.

The petitioner resisted the said action and determination of the Commissioner and insisted that until April 4, 1934 (the date on which petitioner became 28 years of age), the petitioner did not acquire a substantial ownership of the said securities and that no part of the said trust estate vested in the petitioner until he arrived at the age of 28 years; that until petitioner arrived at the age of 28 years the only interest which he had in the trust estate was to receive such payments from the income thereof if, as and when, payable to him under the terms of the will; that petitioner's interest was merely expectant and contingent; and that unless and until he arrived at the age of 28 years "no part of the trust estate would have vested in him" and that, therefore, petitioner did not "ac-

quire" the property or any substantial ownership or estate therein until April 4, 1934.

For the foregoing reasons the petitioner contended that he acquired the property on April 4, 1934, within the meaning of section 113 (a) (5) of the Revenue Act of 1934, which says:

> "If the property was acquired by bequest, devise or inheritance * * * the basis shall be the fair market value of such property at the time of such acquisition * * *."

Petitioner therefore contended that the proper basis for computing his gain or loss on the sale of the said securities was
52 the fair market value of the said securities on April 4, 1934, the date on which they were acquired by him.

Petitioner contended and argued that the nature of his interest in the trust res had been fixed and determined by a decision of the Supreme Court of North Carolina in a suit involving the instant trust, wherein the Supreme Court (affirming the lower Court) held that the will of R. J. Reynolds, deceased, did not bequeath or devise to the petitioner any vested interest or share in the trust estate (or any part thereof) created and established by said will; that no part of the trust estate would have vested in petitioner unless and until he arrived at the age of 28 years; that until petitioner arrived at the said age of 28 years the only interest which he had in the trust estate was to receive certain income payments therefrom, if, as, and when payable to him, under the terms of the will; and that a beneficiary of the trust dying before arriving at the age of 28 years could not transfer any part of the trust corpus to anyone by reason of his death.

The Commissioner contended that under the law governing wills and the descent and distribution of the property of the decedent, all titles to property acquired by bequest, devise, or inheritance relates back to the date of the decedent's death, even though the interest of him who takes the title was, at the date of the death of the decedent, legal, equitable, vested, contingent, general, residual, conditional, executory, or otherwise; and that even though, up to and until April 4, 1934, the petitioner's rights and interests in the trust corpus were contingent, conditional, expectant, or otherwise, nevertheless his "acquisition" of the property obtained and
53 became fixed; and that his "acquisition" of the property was complete, regardless of the nature, quality, or extent of his right or interest therein.

III

In its decision the Board rendered an opinion in which the stipulated facts are incorporated by reference.

In its opinion the Board rejected petitioner's contention that the phrase "time of acquisition" must be construed with regard to

the nature of the interest acquired, and that if it is merely expectant, contingent, or conditional, it may not be regarded as an acquisition of the property under North Carolina law. The Board held, on the contrary, that the application of the statute does not depend on the nature, quantity, or quality of the interest of the beneficiary; and that even though, prior to petitioner's 28th birthday (when the property was actually distributed to and actually received by the petitioner) his interest in the property was merely contingent, conditional, or expectant, nevertheless the property is to be regarded as having been acquired by him when his father died 16 years before; and that, in the matter of the bonds, the petitioner will be regarded as having "acquired" those bonds at the time the Trustee purchased them.

The Board found that petitioner actually received the property only when it was distributed to him on April 4, 1934, but held that "time of acquisition" means the date of decedent's death, and stated that such was the reasoning of Brewster v. Gage, 280 U. S. 327; whereas such was not the reasoning of Brewster v. Gage, because in that case it was conceded that the beneficiary's interest vested at the date of decedent's death, and the Supreme
54 Court held that the property was "acquired" by the beneficiary at the time his interest became vested; and that case did not hold that a contingent or conditional right in property, or a property right which was not vested, was one which was "acquired" at the date of testator's death. The decision of the Board is not supported by Brewster v. Gage, but is in conflict with it. The decision of the Board is also in conflict with the long-continued Departmental construction which has received legislative sanction and approval.

IV

Petitioner being aggrieved by said opinion, decision, and order of the Board, and being an individual taxpayer residing in the State of North Carolina, and having filed his income-tax return for said year 1934 in the office of the Collector of Internal Revenue for the Collection District of North Carolina, desires a review thereof in accordance with the provisions of the Revenue Act of 1926 (as amended) and in accordance with other pertinent provisions of law, by the United States Circuit Court of Appeals for the Fourth Circuit, within which Circuit is located the residence of the petitioner and within which Circuit is located the offce of the Collector of Internal Revenue to whom petitioner made his income-tax return for 1934.

V

Petitioner says that in the Decision, Opinion, and Order of the Board manifest error occurred and intervened to the prejudice of the petitioner, and petitioner assigns the following errors and each of them, which, he avers, occurred therein and upon which he relies to reverse said Decision and Order so entered by the Board in this cause, to wit:

55 1. The Board erred in concluding and deciding that petitioner "acquired" the said Reynolds common stock upon the date of the death of R. J. Reynolds, deceased.

2. The Board erred in concluding and deciding that petitioner "acquired" the said bonds upon the date or dates when said bonds were purchased by the Trustee.

3. The Board erred in concluding and deciding that the "acquisition" of said stock by petitioner related back to the death of R. J. Reynolds, deceased, even though the interest of petitioner in said stock was not vested in him until April 4, 1934, and even though prior to that date petitioner's interest was merely contingent and conditional.

4. The Board erred in concluding and deciding that the "acquisition" of said bonds by petitioner related back to the date or dates of their purchase by the Trustee, even though an interest in said bonds was not vested in him until April 4, 1934, and even though prior to that date petitioner's interest was merely contingent and conditional.

5. The Board erred in concluding that the decision in Brewster v. Gage, 280 U. S. 327, was to the effect that such "acquisition" relates back to the date of decedent's death when the interest of the beneficiary did not vest at date of decedent's death, whereas that case was specifically grounded on the fact that the interest of the beneficiary became vested at decedent's death and for that reason was acquired by the beneficiary at that date.

6. The Board erred in failing and refusing to decide that petitioner acquired the said securities on April 4, 1934, on which date his interest in them became vested.

56 7. The Board erred in failing and refusing to decide that petitioner's "basis" for computing gains and losses (on the sale of said securities) was the market value of said securities on April 4, 1934, on which date his interest in them became vested and on which date he acquired a substantial property interest in them.

8. The Board erred in deciding that petitioner's said "basis" as to the Reynolds' stock was the value of said stock on the date of decedent's death; and, as to the bonds, was the same as the Trustee's basis.

9. The Board erred in failing and refusing to decide for the petitioner.

10. The Board erred in deciding for the respondent.

11. The Board erred in adding to petitioner's net income the amount of $61,027.63.

12. The Board erred in entering its decision and order of January 11, 1940, stating that there is a deficiency in income tax for the year 1934, of $33,878.61.

13. The Board erred in that its Opinion and Decision are not supported by the evidence but are contrary to the evidence and contrary to law.

Wherefore, petitioner prays that the Circuit Court of Appeals for the Fourth Circuit may review the action, Decision, and Order of the Board of Tax Appeals in this case, and direct the entry of a decision by said Board in favor of the petitioner, determining that there is no deficiency in income tax for the year 1934, by reason of the sales of securities in 1934, here in question,
57 which constitute the subject matter of this appeal; and that the Clerk of said Board be directed to transmit and deliver to the Clerk of this Court, certified copies of all and every of the documents necessary and material to the presentation and consideration of the foregoing petition for review, as required by the rules of this Court, and by statutes made and provided; and for such other and further relief as may to this Court appear proper in the premises.

J. Gilmer Korner, Jr.,
404 Transportation Building, Washington, D. C.

Of Counsel:
H. G. Hudson,
Wachovia Bank Building, Winston-Salem, N. C.
Stratton Coyner,
Reynolds Building, Winston-Salem, N. C.

Duly sworn to by Richard J. Reynolds; jurat omitted in printing.

58 In United States Circuit Court of Appeals for the Fourth Circuit

[Title omitted.]

[File endorsement omitted.]

To B. D. Gamble, *Clerk*,
United States Board of Tax Appeals.

Praecipe for transcript of record

Filed March 26, 1940

To B. D. GAMBLE, *Clerk*,
United States Board of Tax Appeals.

SIR: It is requested that you prepare a transcript of the record in this cause, as required by law and the rules of the Board and the rules of the United States Circuit Court of Appeals for the Fourth Circuit, under the appeal heretofore perfected in the above-entitled cause, and include in said transcript the following documents:

1. The docket entries in this proceeding in the Board.
2. The pleadings in the Board, including
   (a) the Petition.
   (b) the Answer.
3. The Stipulation of Facts filed by the parties in the Board on April 12, 1939, together with, and including, "Exhibit A" and "Exhibit B," referred to and described in paragraph 13 of said stipulation, and filed with and made a part of said stipulation.
4. The "Submission under Rule 30" filed April 12, 1940.
5. Opinion of the Board, promulgated January 10, 1940.
6. Decision and Order of the Board entered January 11, 1940.

59 7. The Petition for Review filed by petitioner on the 25th day of March 1940.

8. This Praecipe.

J. G. KORNER, Jr.,
J. G. Korner, Jr.,
Transportation Building, Washington, D. C.,
Attorney for Petitioner-Appellant.

Of Counsel:
H. G. HUDSON,
Wachovia Bank Building, Winston-Salem, N. C.
STRATTON COYNER,
Reynolds Building, Winston-Salem, N. C.

Service of the above Praecipe acknowledged this 26th day of March 1940.

J. P. WENCHEL,
J. P. Wenchel.
Chief Counsel, Bureau of Internal Revenue.

60 [Clerk's certificate to foregoing transcript omitted in printing.]

61 In United States Circuit Court of Appeals for the Fourth Circuit

No. 4641

RICHARD J. REYNOLDS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition to Review the Decision of the United States Board of Tax Appeals

Docket entries

April 22, 1940, the transcript of record is filed and the cause docketed.

Same day, original exhibits A and B are certified up.

April 24, 1940, the appearance of J. Gilmer Korner, Jr., and H. G. Hudson is entered for the petitioner.

Same day, statement of portions of the record petitioner proposes to print in appendix to brief is filed. Service acknowledged.

April 27, 1940, the appearance of Samuel O. Clark, Jr., Assistant Attorney General, and Sewall Key, Special Assistant to the Attorney General, is entered for the respondent.

May 2, 1940, the appearance of J. P. Wenchel, Chief Counsel, and John M. Morawski, Special Attorney, Bureau of Internal Revenue is entered for the respondent.

62 Same day, the appearance of Stratton Coyner is entered for the petitioner.

May 21, 1940, brief and appendix on behalf of the petitioner filed.

June 6, 1940, the appearance of Joseph M. Jones, Special Assistant to the Attorney General, is entered for the respondent.

Same day, brief and appendix on behalf of the respondent filed.

June 21, 1940, reply brief on behalf of the petitioner filed.

Argument of cause

June 28, 1940 (June term, 1940), cause came on to be heard before Soper and Dobie, Circuit Judges, and Chesnut, District Judge, and was argued by counsel and submitted.

July 3, 1940, supplemental memorandum on behalf of petitioner filed.

63 In United States Circuit Court of Appeals, Fourth Circuit

No. 4641

RICHARD J. REYNOLDS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition to Review the Decision of the United States Board of Tax Appeals

(Argued June 28, 1940. Decided October 7, 1940)

Before Soper and Dobie, Circuit Judges, and Chesnut, District Judge

J. Gilmer Korner, Jr., and H. G. Hudson (Stratton Coyner on brief) for Petitioner, and Joseph M. Jones, Special Assistant to the Attorney General, (Samuel O. Clark, Jr., Assistant Attorney General, and Sewall Key, Special Assistant to the Attorney General, on brief) for Respondent.

Opinion

Filed October 7, 1940

64 SOPER, Circuit Judge:

On April 4, 1934, the taxpayer, Richard J. Reynolds, received certain securities from a trustee in accordance with the terms of the will of R. J. Reynolds, his father, who died on July 19, 1918. Later in 1934 the taxpayer sold some of the securities at a profit; and the question is whether, in ascertaining the cost basis under the taxing statute of that year, the securities were acquired when he received them from the trustee, or when his father died and the will became effective. The Commissioner of Internal Revenue asserted that the acquisition took place upon the father's death and determined a deficiency of $33,878.61. From the approval of this determination by the Board of Tax Appeals, the taxpayer appealed.

The will directs that the residue of the estate shall be divided by the executor between the wife of the testator and his children living at his death and the living issue of any deceased child, per stirpes; i. e., one-third to the wife and two-thirds to the children and the issue of any deceased child, to be equally divided among them, share and share alike, but subject, as to the two-thirds of the residue left to the children, to the following trust: The children's

shares are devised and bequeathed to the Safe Deposit and Trust Company of Baltimore as trustee, to collect therefrom for their equal benefit all the income until they severally arrive at the age of 21 years, meanwhile making necessary payments out of the income to the widow for the support and education of each of the children. The trustee is further directed to pay to each child between the ages of 21 and 28 certain monies out of his or her share of the income, and to accumulate the balance of the income for his or her benefit "until he or she shall respectively attain the age of 28 years when each of them shall become entitled to and shall respectively receive from said trustee his or her share of the
65 corpus of my estate, together with the accumulated income aforesaid."

The will also provides that if any of the children should die before he arrives at the age of 28 years, then his share of the estate shall be further held in trust for the benefit of his devisees by will until he would have arrived at the age of 28 years if he had lived, when the trust shall cease and the estate shall become payable to his devisees; and if any of the children should die before arriving at the age of 28 years, without having made a will but leaving issue, then his share shall be held in trust for the benefit of his children until he would have reached the age of 28 years had he survived, when the trust shall cease and the estate shall become vested in his children; and if any of the testator's children should die without a will and without issue living at the termination of the trust, then his share shall be held in like trusts for the surviving children.

In effect, two-thirds of the residue of the estate is devised and bequeathed to a trustee to divide it into as many shares as there were surviving children, the trustee to collect the income from each share and pay over a portion thereof to the child or for his benefit, and to accumulate the rest of the income until the child should reach the age of 28 years and then to pay over to the child the accumulation and the share of the corpus; but if he should die before the age of 28 years, then his share should be paid to his devisees, or if no will, to his surviving children, and if no will or children, then to the surviving children of the testator. Thus the corpus of two-thirds of the residue of the estate was devised in trust to an indefinite class of persons, but no member of the class was to take a part of the corpus unless he should reach the age of 28 years.

The trustee received the trust properties from the executor of the estate in 1926; and on April 4, 1934, when the taxpayer
66 became 28 years of age, distributed to him his share, including the securities sold by him in the taxable year. Some of these securities had been received by the trustee from the decedent's

estate and others had been acquired by the trustee in intermediate transactions under the terms of the will. The Commissioner, in computing the taxpayer's gain upon the sale of the securities, used as the basis the value of the securities at the time of the testator's death as to those then held by him, and the cost of the securities to the trustee as to those which it acquired thereafter. The position of the taxpayer before the Board of Tax Appeals and before this court is that since he did not become entitled to the property until April 4, 1934, he did not acquire any of it prior to that date within the meaning of the statute.

The Revenue Act of 1934, Ch. 277, 48 Stat. 680, 26 U. S. C. A. 113, provides:

"§ 113. Adjusted basis for determining gain or loss.

(a) Basis (Unadjusted) of Property.—The basis of property shall be the cost of such property; except that—

* * * * *

(5) Property transmitted at death.—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * *"

The decision of the Board is in harmony with Art. 113 (a) (5) of Treasury Regulations 86, promulgated under the Revenue Act of 1934:

"Art. 113 (a) (5)-1.—Basis of property acquired by bequest, devise, or inheritance.—(a) Property included.—Section 113 (a) (5) applies—

(1) to all property passing from a decedent by his will or under the law governing the descent and distribution of property of decedents; and

67 (2) to property passing under an instrument which, under section 113 (a) (5) is treated as though it were a will, but applies to such property only at the times and to the extent prescribed in section 113 (a) (5).

(b) Basis.—Under the law governing wills and the descent and distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113 (a) (5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's

death, regardless of the time when the taxpayer comes into possession and enjoyment of the property. * * *"

It will be perceived that under this regulation the time of acquisition of property passing from a decedent by will is the date of the decedent's death, whether the interest of the recipient is vested or contingent. The taxpayer concedes that the title to a vested interest relates back to the death of the decedent; but he contends that he was left only a contingent interest by his father's will, and that such an interest is not acquired within the true meaning of the statute until the contingency takes place. We must therefore first inquire whether the interest of the taxpayer under his father's will was vested or contingent, and the answer must be found in the law of North Carolina. Blair v. Commissioner, 300 U. S. 5, 9; Uterhart v. United States, 240 U. S. 598; Lane v. Corwin, 2 Cir., 63 F. 2d 767, 769; Pringle v. Commissioner, 9 Cir., 64 F. 2d 863, 864; Becker v. Anchor R. & I. Co., 8 Cir., 71 F. 2d 355, 357; Warner v. Commissioner, 2 Cir., 72 F. 2d 225, 227; Roebling v. Commis-
68 sioner, 3 Cir., 72 F. 2d 444, 446; Forbes v. Commissioner, 1
Cir., 82 F. 2d 204, 206; Twining v. Commissioner, 2 Cir., 83 F. 2d 954, 955.

The rule in North Carolina in respect to what constitutes a vested as distinguished from a contingent remainder is in general the same as that of the common law. Hooker v. Bryan, 140 N. C. 402, 404. In many instances, as in the case at bar, the question arises with reference to an estate in remainder which is conditioned upon a time element. In such a situation the rule is that if the time specified is annexed to the payment only, the gift vests immediately; but where the time is annexed to the gift itself, as when it goes to the legatee when he arrives at a certain age, the bequest does not vest unless and until he arrives at that age. In applying the rule it should be borne in mind that the law favors the vesting of estates, and that a vested interest may be created by language clearly indicating an intent that a definite person shall receive the property, although the instrument subsequently provides that the gift shall not take effect unless a certain condition, such as the arrival of the beneficiary at a certain age, is fulfilled. Obviously the application of the rule is attended with difficulty and the distinctions drawn in the adjudicated cases, even in the same jurisdiction, are not always clear.

In a number of North Carolina cases, a conditional element of time in testamentary dispositions has been held to create a contingent interest, as where a legacy is given to a person when he arrives at his majority. Kent v. Watson, 17 N. C. 366; Giles v. Franks, 17 N. C. 521; Gill v. Weaver, 21 N. C. 41; Anderson v. Felton, 36 N. C. 55; Whitesides v. Cooper, 115 N. C. 570; Freeman v.

Freeman, 141 N. C. 97; McRae v. Commerce Union Trust Co., 199 N. C. 714; Knox v. Knox, 208 N. C. 141. In other instances, the intent to create a present vested interest was thought to be so clear that the time condition did not introduce a contingency, but at most, made provision for a subsequent divesting of the
69 property in case the condition should not be met. Cooper v. Pridgeon, 17 N. C. 98; Hooker v. Bryan, 140 N. C. 402; Ziegler v. Love, 185 N. C. 40; Henderson v. Western Carolina Power Co., 200 N. C. 443; Hood v. McElvain, 215 N. C. 568. The criterion, of course, is the intent of the grantor or testator. As was said in Freeman v. Freeman, 141 N. C. 97, at p. 99:

"The rule itself is always subservient to the intention of the testator; and therefore, if upon construing the whole will, it clearly appears that the testator meant the time of payment to be the time when the legacy should vest, no interest will be transmissible to the executors or administrators if the legatee dies before the period of payment. * * * For if the testator thinks proper to say distinctly that his legatees, general or residuary, shall not be entitled to the property unless they live to receive it, there is no law against such intention if clearly expressed. 2 Wms. on Executors, 520-1."

Applying these rules to the Reynolds case, it seems clear that it was the intention of the testator to divide two-thirds of the remainder of his estate into as many portions as there were children surviving at the time of his death, and to give to each child a part of the income from one share until he reached the age of 28 years, but to withhold the income accumulated in the meantime and the corpus of the share until he should reach the age of 28 years; so that unless he should attain that age, he would not be entitled to receive this property at all. This condition, it seems to us, was annexed to the gift itself in such a fashion as to create a contingent interest within the rule as illustrated by the North Carolina decisions. See also Roebeling v. Commissioner, 3 Cir., 78 F. 2d 444; Beers v. Commissioner, 3 Cir., 78 F. 2d 447; Forbes v. Commissioner, 1 Cir., 82 F. 2d 204.

The problem is simplified in the pending case by decisions in the North Carolina courts relating to the Reynolds will and discussing the nature of the interest held by the taxpayer and by his brother, Z. S. Reynolds, under the will during the period between
70 the ages of 21 and 28 years. In Reynolds v. Trust Co., 201 N. C. 267, the court considered an application made by Richard J. Reynolds, the taxpayer herein, after reaching the age of 21 years, to receive from the trustee of the estate double the amount made or saved by him in a year, under a provision of the will which directed the trustee to pay to any child between the ages of 21 and 28 two dollars for each dollar that he had made by indi-

vidual effort in any legitimate business or investment, or had saved from money, stocks, or bonds owned by him. Richard J. Reynolds, in computing his savings in the particular year, included in his income the sum of $50,000 allowed him annually under the will between the ages of 21 and 28 from the income on the trust estate set up for his benefit. He took the ground that he had a vested interest in and therefore owned the property from which the income was derived, subject only to a divestment by death before arriving at the age of 28 years; and hence so much of the $50,000 as he did not spend represented savings from money owned by him. The Supreme Court of North Carolina, without expressly characterizing the interest as vested or contingent, rejected the petitioner's contention and held that the income received from the trustee was not derived from monies or property owned by the taxpayer, and also held that the purpose of the testator to encourage habits of thrift on the part of his children would not be served by treating part of this income as money the taxpayer had made or saved through his own individual effort.

This decision was discussed by the Superior Court of Forsyth County and by the Supreme Court of North Carolina in Reynolds v. Reynolds, 208 N. C. 578, wherein was considered a petition to set aside a contract of settlement which made provision for Anne Cannon Reynolds II, a child of Z. S. Reynolds and his divorced wife Anne C. Reynolds. Z. S. Reynolds died before he reached the age of 21. The case arose after his second marriage and death, and after the posthumous birth of Christopher
71 Smith Reynolds, a son by the second marriage. The inter-
ested parties were joined in the proceeding and the court was called upon to consider among other things the validity of the divorce, the validity of a will of Z. S. Reynolds, and the validity and fairness of the prior settlement for the benefit of the child of the first marriage. Ultimately the court approved a compromise settlement wherein it was agreed that out of the Z. S. Reynolds' share of the estate, divers payments should be made to his children, his second wife, and his brother and sisters.

During the pendency of the proceeding, the State of North Carolina was allowed to intervene and assert a claim for inheritance taxes on the share of Z. S. Reynolds in the estate. The State claimed that under the R. J. Reynolds' will, Z. S. Reynolds took a vested interest in a share of the estate and that the transfer of this interest upon his death gave rise to inheritance or succession taxes for which the State Commissioner of Revenue had levied an assessment. The court was petitioned to determine the exact amount of the taxes due and to decree that they be paid from the property in the hands of the trustee. The other parties to the cause, including the guardians of the infant children, the

brother and sisters of Z. S. Reynolds, and the trustee under the will of R. J. Reynolds, took issue with the claim of the State of North Carolina and averred that as Z. S. Reynolds died before he was 28 years of age, no part of the trust estate created by the will of his father, and no part of the accumulated income vested in him, and therefore no part thereof was transferred from him upon his death in such a way as to become subject to an inheritance or succession tax.

The brother and sisters of Z. S. Reynolds, however, proposed a settlement of all claims of the State of North Carolina for taxes in the sum of two million dollars, to be paid out of the share of Z. S. Reynolds; and this proposal of compromise was considered by the court in connection with the compromise settlement
72 affecting the claims of the various parties interested in the
estate. The court, having considered the will of R. J. Reynolds, held that thereunder Z. S. Reynolds did not acquire any vested interest in the trust estate or in the accumulated income, and that none of it would have vested in him unless and until he arrived at the age of 28 years. In reaching this conclusion, the court referred to the fact that in Reynolds v. Trust Co., 201 N. C. 267, the point was raised that the similar interest of Richard J. Reynolds under the will was a vested interest, but that the petition for increased allowance based on this assumption had been rejected. The court also referred to the uncertainty of the application of the State statute in the event of the nonexercise of a power of appointment. Finally the court approved the proposed compromise of the claim of the various parties interested in the estate of Z. S. Reynolds, including the claim of the State of North Carolina for taxes, on the ground that the settlement proposed was for the best interests of the infants and of all of the parties, recognizing that the claims of the interested parties, including that of the State, presented difficult questions likely to result in long, expensive, and uncertain litigation. An appeal was taken from the judgment of the Superior Court, but it was approved by the Supreme Court in Reynolds v. Reynolds, 208 N. C. 578. It thus appears that the precise point at issue in the pending case as to the quality of the interest of Z. S. Reynolds and of R. J. Reynolds, the taxpayer herein, was considered by the Superior Court of Forsyth County, and that it was definitely decided that the interest was contingent and not vested.

The inquiry in its final aspect is whether the date of acquisition by the legatee of a contingent remainder within the meaning of § 113 (a) (5) of the Act of 1934 is the date of the testator's death or the date of the event upon which the remainder becomes vested.

Strong light is thrown upon this question by the legisla-
73 tive history of the revenue acts, because § 113 (a) (5) of

the Act of 1934 is substantially the same as the corresponding sections of prior acts, i. e., § 202 (a) (3) of the Act of 1921, § 204 (a) (5) of the Act of 1924, and § 204 (a) (3) of the 1926 Act. It is important to ascertain how these prior statutes have been construed by the Treasury Department and by the courts.

In 1920 the Treasury Department, recognizing the distinction between vested and contingent remainders, held that if the interest of a remainderman in the property bequeathed by the will is contingent only prior to the death of the life tenant, the basis for determining gain or loss from the sale of the property by the remainderman is its value on the date of the death of the life tenant. O. D. 727, C. B. 53. Again in 1932 the General Counsel of the Bureau of Internal Revenue stated that the position of his office had been that one who has a mere contingent interest in property does not acquire the property until his interest becomes vested. G. C. M. 10260, C. B. XI–1, 79, 80.

The same conclusion was reached in the decisions of the courts which were called upon to interpret the earlier acts. In Pringle v. Commissioner, 9 Cir., 64 F. 2d 863, cert. denied 290 U. S. 656, wherein the Revenue Act of 1921 was interpreted and applied, the will of the testatrix created a trust for a period of 25 years from the birth of the youngest child living at her death, and provided that upon the termination of the trust the property should be distributed among such of the children as should be then living, the issue of a deceased child to take the parent's share, and if no issue, the whole to go to the survivors. Holding that the remainder was contingent under the State law the court said: (p. 864)

"It is not question that a person can not be said to have 'acquired' property within the meaning of the Revenue Act, § 202 (a) (3) supra, before he has some substantial ownership therein. If his interest is contingent upon the happening of some future event, until the happening of that contingency when his
74 interest becomes vested, he has merely a possibility of acquiring an estate and can not be said to have any substantial ownership therein. The rulings of the Department of Internal Revenue have consistently been to the effect that where one has merely a contingent interest in property he does not 'acquire' that property until his interest becomes vested * * *.

Petitioners' interests in the property becoming vested on July 25, 1923, it was on that date that they 'acquired' the property within the meaning of § 202 (a) (3) of the Revenue Act of 1921, supra, and the value of the property on that date should have been taken as the base for determining the gain or loss from the sale. * * *

The cases of Brewster v. Gage, 280 U. S. 327, and Chandler v. Field (C. C. A. 1), 63 F. 2d 13, are not controlling here. In each of those cases the interest of the taxpayer became vested immediately upon the death of the testator."

In Lane v. Corwin, 2 Cir., 63 F. 2d 767, cert. denied 290 U. S. 644, under the Revenue Act of 1928, a somewhat similar testamentary provision was considered. The court said: (p. 770)

"Since the interest of the appellants was merely contingent and not vested, they should not be considered as having acquired the property at the time of the death of the testatrix. The will gave the realty to the trustees in the manner described without any remainderman being stated as part of the trust provisions. A later clause in the will stated that upon termination of the trust 'each of my surviving sons shall become seized absolutely of an undivided one-fourth interest in such real estate as may be then held in trust; the one-fourth interest of any of my sons who shall have died prior to or contemporaneously with the termination of such trust shall pass absolutely to his issue, if any, per stirpes. In default of such issue, such portion shall pass absolutely to his heirs as determined by the statutes of New York as to real property.'

The complete enjoyment of the real estate could be obtained only after satisfying both the contingency of the
75 termination of the trust and the contingency of the survival
of the sons after the termination of the trust. This interest is not substantially a specific or general devise within the first sentence of § 113 (a) (5). Therefore it falls within the third sentence of the statute, and the date of acquisition by the deed is the basis upon which to determine the cost to appellants."

See also Becker v. Anchor R. & I. Co., 8 Cir., 71 F. (2d) 355, and Forbes v. Commissioner, 3 Cir., 82 F. (2d) 204. The converse of the rule, where the remainder under consideration was vested, was applied in Brewster v. Gage, 280 U. S. 327, where it was held that within the meaning of the Revenue Acts of 1918 and 1921 the time of acquisition by a residuary legatee of his interest in the estate of the testator was not the date of distribution but the date of the testator's death; and the same rule was applied in Chandler v. Field, 1 Cir., 63 F. 2d 13, cert. denied 289 U. S. 758; Huggett v. Burnet, App. D. C., 64 F. 2d 705; Molter v. Commissioner, 7 Cir., 69 F. 2d 7; Hopkins v. Commissioner, 7 Cir., 69 F. 2d 11; Warner v. Commissioner, 2 Cir., 72 F. 2d 225, cert. denied 293 U. S. 620; Roebling v. Commissioner, 3 Cir., 78 F. 2d 444; Beers v. Commissioner, 3 Cir., 78 F. 2d 447, cert. denied 296 U. S. 620; Twining v. Commissioner, 2 Cir., 83 F. 2d 954, cert. denied 299 U. S. 578.

All of these cases arose under the Acts of 1921, 1924, or 1926, which were similar in this respect to the Act of 1934 now before

the court, except Lane v. Corwin, Becker v. Anchor R. & I. Co., Forbes v. Commissioner, and Twining v. Commissioner, which arose under the Act of 1928. That Act and the Act of 1932 were couched in language that differed from the prior and subsequent legislation. § 113 (a) (5) of the Revenue Act of 1928 and of the Revenue Act of 1932 provided in part as follows:

"Property Transmitted at Death. If personal property was acquired by specific bequest, or if real property was ac-
76 quired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

Although the language is changed, the word "acquired" is used in these intervening Acts, and therefore decisions interpreting the word as used therein are relevant. In addition to the decisions of the Circuit Courts of Appeals above referred to, reference may also be made to Helvering v. San Joaquin Co., 297 U. S. 496, dealing with the Revenue Acts of 1921, 1924, 1926, and 1928, where it was held that real property was "acquired" within the meaning of these statutes under a lease containing an option to purchase not when the lease was made but when the option was exercised, the court saying: (p. 499)

"If we should agree that a lessee-optionee acquires, by virtue of the instrument, an equitable interest in the land, it would not follow that, within the contemplation of the revenue acts, he acquires the property at the date of the option rather than at the date of conveyance. The word "acquired" is not a term of art in the law of property but one in common use. The plain import of the word is "obtained as One's own." Language used in tax statutes should be read in the ordinary and natural sense. In the common and usual meaning of the term, the land was acquired when conveyed to the respondent's predecessor."

If we apply the definition of the word "acquired," as given by the Supreme Court, it seems clear enough that the taxpayer did not acquire or obtain the property "as his own" until the contingency happened which made his ownership definite and certain. See also McFeely v. Commissioner, 296 U. S. 102.
77 The reenactment of the section in 1934 in substantially the same words as the earlier statutes is of great significance

in view of the fact that a number of the cited decisions interpreting the term "acquired" had already been handed down when the statute was passed. It is a "familiar rule that where words are employed in an act which had at the time a well-known meaning in the law, they are used in that sense, unless the context requires the contrary"; Case v. Los Angeles Lumber Co., 308 U. S. 106, 115; and when a statute has been amended from time to time and language which has been construed by the courts is retained, it must be assumed that Congress is satisfied with and has adopted the construction given by the courts. Electric Battery Company v. Shimadzu, 307 U. S. 5, 12; see also Copper Queen Cons. Mining Co. v. Arizona, 206 U. S. 474; Commissioner v. Winmill, 305 U. S. 79.

It is of interest that as late as November 24, 1939, the Board of Tax Appeals in Van Vranken v. Commissioner, 40 B. T. A. 955, pointing out that the provisions of the Revenue Act of 1934 were similar to the Revenue Acts of 1921, 1924, and 1926, cited the decisions interpreting the earlier acts, and held that the date of acquisition of the interest of the remainderman depends upon whether the interest is vested or contingent. This position was reversed by the Board in Augustus v. Commissioner, 40 B. T. A. , decided December 20, 1939, and Archibald v. Commissioner, 40 B. T. A. , December 22, 1939. The Commissioner of Internal Revenue changed his position in 1935 upon the promulgation by the Treasury Department of Regulations 86, Art. 113 (a) (5) (b) which, as we have seen, provides that "all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent even though the interest of him who takes the title was, at the date of the death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise." Obviously this regulation amounts to an unwarranted amendment of the Act of 1934 if we are right in our assumption that this Act should be given the same interpretation as its predecessors of similar import. It is, of course, immaterial that the regulation does not favor the government at the expense of the taxpayer, or that it makes for uniformity, simplicity, and ease of administration. "We ought not to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended, but failed to express." McFeely v. Commissioner, 296 U. S. 102, 111.

78

The Commissioner, however, asserts that the circumstances under which the Act of 1934 was passed clearly indicate an intent on the part of Congress to provide a uniform basis for all interests passing under a will, whether vested or contingent. The burden of the argument is that when the Act was under consideration, the

attention of Congress was called to the decision of Brewster v. Gage, 280 U. S. 327, and that Congress understood it to hold that under the Acts of 1918 and 1921, the time of acquisition of all property passing by bequest, devise, or inheritance, was the date of the testator's death. It is not denied that the decision was limited to a vested interest, but it is said that the statutory language must be given the meaning which, as Congress believed, had been attributed to it by our highest court.

An examination of the circumstances prior to and attendant upon the passage of the Act of 1934 does not support the Commissioner's contention. The reports of the Committees of the 70th Congress, 1st Session (Ways & Means Committee of the House, Report No. 2, p. 18; Finance Committee of the Senate, Report No. 960, p. 26), show that the change in the 1928 Act was brought about by dissatisfaction with the decision in McKinney v. United States,[1] 62 Ct. Clms. 180, cert. denied 273 U. S. 716, wherein
79 it was held that the basis for determining gain or loss on a sale by an executor is the cost of the property to the decedent. The House preferred the rule that the basis in such a case should be the value at the time of the decedent's death, and proposed broadly that the value at that time be adopted as the basis for property acquired by bequest, devise, or inheritance or by the deceased's estate from the decedent. Such a provision, if adopted and continued in the taxing statutes, would have accomplished the result for which the present regulation was designed; but the Senate refused to concur, pointing out that the proposal would not cover the sale of property purchased by an executor. The Senate proposed the language finally embodied in the Act of 1928 and repeated in the Act of 1932. The rule of McKinney v. United States was rejected, and a new section under the caption "Property Transmitted at Death" was enacted, wherein it was provided that in the case of property acquired by general or specific devise, or by intestacy, and in the case of property acquired by will or intestacy, the basis should be the value at the time of distribution to the taxpayer. When this new section came before the courts, it was held, as we have seen (Lane v. Corwin, Becker v. Anchor R. & I. Co., and Twining v. Commissioner), that a contingent interest of a beneficiary in property devised to a trustee is not a devise to the beneficiary within the meaning of the statute, and that upon the subsequent sale of the property by the beneficiary, the basis is the value at the time of distribution; and the distinction between vested and contingent remainders in applying the statute to specific cases was preserved.

---

[1] In 1935 the ruling of this case was disapproved in Hartley v. Commissioner, 295 U. S. 216.

These acts were in force in 1933 when Congress came to consider the Act of 1934. The Ways & Means Committee of the House (House Report 704, 73rd Congress, pp. 27–8), noted the lack of uniformity in the treatment of general as compared with special bequests of personal property in the Acts of 1928 and
1932, and said that since the 1928 Act was passed, the Su-
80 preme Court in Brewster v. Gage had defined the date of
acquisition to mean the date of the death of the decedent in the case of all property passing by bequest, devise and inheritance, whether real or personal; and the committee therefore recommended that the language of the Act of 1932 be changed as to conform to the Act of 1926, "so that a uniform basis rule may be required in case of property passing at death whether real or personal."

This comment upon the decision in Brewster v. Gage was correct if it be taken to mean that therein no distinction was made between real and personal property; but it was not correct if it intended to say that the decision recognized no distinction based upon the nature of the estate created by the will of the deceased. The decisions of the courts (see Lane v. Corwin, Chandler v. Field, Pringle v. Commissioner, Huggett v. Burnet, Hopkins v. Commissioner, and Beers v. Commissioner), show that in Brewster v. Gage the court was concerned only with a vested interest. Moreover, it was made clear to the House Committee by representatives of the Treasury Department that the decision covered only one or two points, and that while the proposed amendment would eliminate some of the distinctions in the Act of 1928, it would not produce a uniform rule applicable to all situations. Our conclusion is that we are not warranted in departing from the general rule that where words are employed in one Act which had acquired a well-known meaning in the law, they are to be given the same significance when used in a later statute. The history of the legislation under consideration does not reveal that Congress in reenacting in 1934 the language contained in the Acts of 1921, 1924 and 1926, intended that it should have a significance different from that attributed to it by the courts in construing the earlier acts.

It is suggested that a very definite trend to get away from the
nice distinctions of the law of property in applying federal
81 statutes of taxation is apparent in recent cases. For ex-
ample, in Helvering v. Hallock, 309 U. S. 106, the federal estate tax enacted by the Revenue Act of 1926 was held to cover not only interests which passed at death, according to the strict technicalities of the law of property, but also transfers inter vivos clearly akin to testamentary dispositions. Undoubtedly the distinction between vested and contingent remainders is of like technicality; and if we were free to treat the question of statutory

interpretation in this case apart from its legislative history, considerations of uniformity and simplicity would be entitled to great weight. But the doctrine that reenactment of a statute impliedly adopts a settled judicial construction of the language employed was again recognized in the cited case (p. 120, n. 7), and although it was there thought to be irrelevant, its bearing here in the light of the legislative history of the statute is manifest. One practical consideration that may distinguish the situation in the pending case from that before the court in Helvering v. Hallock, is that an interpretation of the Act of 1934 in harmony with that given to the prior acts of like import is no more likely to benefit the taxpayers than the government.

We reach the conclusion that the correct basis for the calculation of the gain or loss of the taxpayer is the value of the securities when distributed to him by the trustee. Certain of these securities were owned by the decedent at the time of his death, and having passed under the will to the trustee, were retained by it until distribution to the taxpayer. Other securities distributed to the taxpayer when he reached the age of 28 years had been purchased by the trustee in the exercise of its power of administration of the trust. The Commissioner contends that the latter securities did not constitute property "acquired by bequest, devise, or inheritance" within the meaning of § 113 (a) (5) of the Act of 1934, and that the basis thereof was the cost of the securities to
82 the trustee. The Commissioner points to no provision of the
statute, other than § 113 (a) (5) as applicable to such a situation, but suggests that it is covered by Regulations 86, Article 113 (a) (5)–1 (a) which provides in part that if the property is an investment by the fiduciary under a will "the cost or other basis to the fiduciary is taken in lieu of the fair market value at the time when the decedent died." This regulation, however, seems to have no relevancy to the instant case since it is entitled "Property Acquired before March 1, 1913; Reinvestment by Fiduciary," and expressly refers to the case of a decedent who has died before March 1, 1913. We recur to the statute for there is no reason to believe that Congress, in covering other contingencies, made no provision for the basis of securities purchased by a trustee under a will and subsequently passing to a beneficiary. In our opinion, § 113 (a) (5) of the Act covers securities purchased by the trustee in the administration of the estate and distributed to the taxpayer, as well as securities received by the trustee from the decedent's estate and similarly distributed. Obviously the will of R. J. Reynolds was the source of the taxpayer's acquisition in both cases. We are in accord with the views expressed upon a similar question under the Revenue Act of 1928 in Commissioner v. Gambrill, 2 Cir., 112 F. 2d 530, 533. Cf. Commissioner v. McGuire, 7

Cir., 111 F. 2d 843. We conclude that the basis for determining gain to the taxpayer is the same as to both classes of securities: (1) those owned by the testator at the time of his death, and (2) those purchased by the trustee. This basis is the fair market value of the securities at the time they were distributed by the trustee to the taxpayer, when the interest of the taxpayer therein that, up to that time, had been contingent, became absolute and vested.

The order of the Board of Tax Appeals is reversed, and the case is remanded for further proceedings.

Reversed and Remanded.

83 In United States Circuit Court of Appeals, Fourth Circuit

No. 4641

RICHARD J. REYNOLDS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition to Review the Decision of the United States Board of Tax Appeals

Judgment

Filed and Entered October 7, 1940

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision of the said Board of Tax Appeals, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States Board of Tax Appeals for further proceedings in accordance with the opinion of the Court filed herein.

MORRIS A. SOPER,
U. S. Circuit Judge.

October 7, 1940.

Recital as to issuance of mandate

On another day, to wit, November 7, 1940, the mandate of this Court, in this cause, is issued and transmitted to the United

84 States Board of Tax Appeals, at Washington, D. C., in due form.

Same day, the original exhibits A and B are returned to the clerk of the United States Board of Tax Appeals.

[Clerk's certificate to foregoing transcript omitted in printing.]

85 In Supreme Court of the United States

Stipulation re exhibits

It is hereby stipulated and agreed by and between the attorneys for the respective parties that the original Exhibits A and B (duly certified as such by the Clerk of the United States Board of Tax Appeals), which are referred to in Paragraph 3 of the Stipulation of Facts (supra, —) filed with the Board on April 12, 1939, and which exhibits were returned to the Clerk of the Board by the United States Circuit Court of Appeals for the Fourth Circuit on November 7, 1940, i. e., the day on which that court issued and transmitted its mandate to the Board (supra, —), may be filed with the Clerk of the Supreme Court of the United States and considered by that Court as a part of the certified record
86 in the case.

Because of the voluminous character of these exhibits printing thereof is waived and may be dispensed with unless required by the Court.

A copy of this stipulation may be printed as an appendix to the record.

FRANCIS BIDDLE,
Solicitor General.
J. G. KORNER, Jr.,
Attorney for the Respondent.

Dated December 27, 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1941

Supreme Court of the United States

Order allowing certiorari

Filed February 17, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, limited to the questions presented by the petition, with the exception of the question whether the remainder was vested or contingent under the law of North Carolina.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941

BLANK PAGE

BLANK PAGE

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	3
Specification of errors to be urged	6
Reasons for granting the writ:	
I. As to the securities which had been owned by the decedent	7
II. As to the securities purchased by the trustee	10
Conclusion	11
Appendix	12

CITATIONS

Cases:	
Archbold v. *Helvering*, decided December 2, 1940	9
Commissioner v. *Maguire*, 111 F. (2d) 843, No. 346, present Term	10, 11
Helvering v. *Hallock*, 309 U. S. 106	8, 9
Van Vranken v. *Helvering*, decided December 2, 1940	8
Statutes:	
Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 113 (U. S. C., Title 26, Sec. 113)	12
Miscellaneous:	
Treasury Regulations 86, promulgated under the Revenue Act of 1934, Art. 113 (a) (5)–1	12

282861—41

BLANK PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 684

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RICHARD J. REYNOLDS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above cause, reversing the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals is reported in 41 B. T. A. 59 (R. 28). The opinion of the court below is reported in 114 F. (2d) 804 (R. 41).

JURISDICTION

The judgment of the court below was entered October 7, 1940 (R. 55). The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Pursuant to a testamentary trust established under the will of the taxpayer's father, the taxpayer's share was distributed to him when he became 28 years of age. He thus received not only securities formerly owned by the decedent but also other securities purchased by the trustee. During the year 1934, the taxpayer sold securities of both groups, and the questions presented relate to the proper basis for determining gain or loss upon these sales, namely:

(1) Whether, under Section 113 (a) (5) of the Revenue Act of 1934 and the regulations promulgated thereunder, the basis of the first group of securities is their value at the date of decedent's death, rather than their value at the date of delivery by the trustee to the taxpayer when he became 28 years of age; and

(2) Whether the basis of the second group of securities is their cost to the trustee rather than their value at the date of delivery by the trustee to the taxpayer.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 12–14.

STATEMENT

Taxpayer's father died July 19, 1918 (R. 24). By his will,[1] he provided that the residue of his estate should be divided, one-third to his wife absolutely (with certain qualifications), and the remaining two-thirds "to my children and the living issue of any deceased child, per stirpes, to be equally divided among them, share and share alike," subject, however, to the conditions of a specified trust (R. 16). Under the trust "herein created for the benefit of my children" (R. 17), the trustee was directed to collect "all the income from my children's shares of my estate and, until they severally arrive at the age of twenty-one (21) years, to pay to my wife, out of their respective shares, so much of said income as she may deem necessary or requisite for the support, maintenance, and education of each (of) them" (R. 17). The trustee was given similar discretion in the event that the wife should die before any of the children should become 21 years of age (R. 17). The will then provided (R. 17–18):

[1] For convenience, all references herein to the will are to the extracts therefrom in Exhibit B attached to the taxpayer's petition filed with the Board of Tax Appeals (R. 16). The will is set out in full in Exhibit A, which is referred to in paragraph 3 of the Stipulation of Facts (R. 24). Since Exhibit A is voluminous, it was stipulated by the parties on December 27, 1940 (R. 56) that it need not be printed but that it be separately certified and as such made a part of the record by reference.

(5) From and after each of my said children shall arrive at the age of twenty-one (21) years and until they respectively attain the age of twenty-eight (28) years, said Trustee is authorized and directed to pay to each of them out of his or her respective share of said income, the sum of Five Thousand Dollars ($5,000) per annum, unless, in the opinion of my wife, that amount shall be inadequate to meet the annual requirements of any one or more of my said children. In that event, and at the written request of my said wife, said Trustee is authorized and directed to enlarge said annual payment of Five Thousand Dollars ($5,000) by whatever amount my wife sees fit to designate, provided the total annual allowance does not exceed Fifty Thousand Dollars ($50,000). Should my wife die while any of my children are between the ages of twenty-one (21) and twenty-eight (28) years, then, from and after her death, said Trustee will pay to each of my said children, out of his or her share of my estate, and provided he or she shall have arrived at the age of twenty-one (21) years, Fifty Thousand Dollars ($50,000) per annum, and is directed to accumulate all the balance of said income for his or her respective use and benefit until he or she shall respectively attain the age of twenty-eight (28) years, when each of them shall become entitled to and shall respectively receive from said Trustee his or her share of the corpus of my estate, together with the accumulated income aforesaid.

In the event that any child should die before arriving at the age of 28, such child was in effect given a general testamentary power of appointment over his or her share in the following terms (R. 18):

> (7) Should any of my children die before he or she shall arrive at the age of twenty-eight (28) years, then the share of my estate which would have been payable to him or her, had he or she arrived at that age, shall be continued to be held by my said Trustee for the use and benefit of his or her devisees by Will until the time that such child would have arrived at the age of twenty-eight years, if he or she had lived, when the said trust shall cease and the estate shall then become payable to such devisees, the Trustee, however, paying in the meanwhile the income from said share to them; * * *.

Provision was then made for other disposition in the event of default of exercise of the power of appointment (R. 19).

The trustee received the trust assets from the estate in 1926 and distributed the taxpayer's share, including securities, to him on April 4, 1934, when he became twenty-eight. Some of the securities so distributed had been received by the trustee from the decedent's estate and others had been acquired by the trustee in intermediate transactions. Taxpayer sold some of the securities during the year at a profit. In computing gain, he used as the basis the value on April 4, 1934, when he received them

from the trustee. The Commissioner, however, determined that the proper basis was the value of the securities at the time of the father's death in the case of those then held by the father, and their cost to the trustee in the case of those which it had acquired thereafter (R. 10). The Board of Tax Appeals approved the Commissioner's determination (R. 29), but the Circuit Court of Appeals reversed (R. 55).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that the basis for the determination of the respondent's gain or loss upon the sale by him in the taxable year 1934 of securities which were distributed to a testamentary trustee under the terms of his father's will and by the trustee to the respondent as a part of his share under the will when he became 28 years of age was their value at the date of the distribution to him.

2. The court below erred in holding that the basis for the determination of the respondent's gain or loss upon the sale by him in the same taxable year of securities which were acquired by the trustee in intermediate transactions but were likewise distributed to the respondent by the trustee as a part of the respondent's share under the will when he reached the age aforesaid was their value at the time of their distribution to the respondent aforesaid.

3. The court below erred in holding that, under the terms of the will of the respondent's father, the interest of the respondent in the securities in question was not vested but merely contingent.

4. The court below erred in reversing the decision of the Board of Tax Appeals which had affirmed the Commissioner's determination to the effect that the basis for the determination of the respondent's gain or loss upon the sale by him in the taxable year aforesaid of the securities mentioned in the first specification of error was their value at the time of his father's death and that the basis for the determination of the respondent's gain or loss upon the sale by him in that year of the securities mentioned in the second specification of error was their cost to the trustee.

5. The court below erred in invalidating or failing to give effect to Article 113 (a) (5)-1 of Treasury Regulation 86.

REASONS FOR GRANTING THE WRIT

I

AS TO THE SECURITIES WHICH HAD BEEN OWNED BY THE DECEDENT

1. Section 113 (a) (5) of the Revenue Act of 1934, Appendix, *infra*, p. 12, provides that where property is "acquired by bequest, devise, or inheritance," then "the basis shall be the fair market value of such property at the time of such acquisition." It is not disputed that the tax-

payer had an *interest* in the property immediately after his father's death, but that full enjoyment was postponed until he should become 28 years of age. He also had a general power of appointment over that property which he could exercise by will before reaching that age. Both the taxpayer and the court below apparently recognize that if petitioner's interest were "vested" at the date of his father's death, then that date is the date of "acquisition" within the meaning of Section 113 (a) (5), notwithstanding that actual distribution may be postponed to a later date or may even be defeated by the happening of a condition subsequent. However, the taxpayer contended and the court held that the interest was "contingent" rather than "vested" under North Carolina law, and that therefore the time of acquisition under the statute was the date the contingency was finally resolved—i.e., the date of distribution to him when he became 28 years of age.

The result thus reached below turns upon the illusive distinction between a "contingent" interest on the one hand and a "vested" interest (which may be divested by the identical contingency), on the other hand—a distinction rejected by this Court for estate tax purposes in *Helvering* v. *Hallock*, 309 U. S. 106. The decision below is thus in square conflict with *Van Vranken* v. *Helvering*, decided by the Circuit Court of Appeals for the Second Circuit

on December 2, 1940, not yet officially reported but found in 1940 C. C. H., Vol. 4, par. 9807, as well as with the *per curiam* decision of the same court on the same day in *Archbold* v. *Helvering* and three other cases disposed of therewith, likewise not yet officially reported but found in 1940 C. C. H., Vol. 4, par. 9808.[2]

2. In deciding against the Government, the court below necessarily invalidated applicable Treasury regulations which govern this precise situation. Article 113 (a) (5)-1 (b) of Regulations 86, promulgated under the Revenue Act of 1934, unambiguously provides:

> (b) *Basis.*—Under the law governing wills and the descent and distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113 (a) (5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accord-

---

[2] In any event, we do not concede that the taxpayer's interest here was contingent, and we wish to reserve the right to make the contention, as we did in the *Hallock* case, that the taxpayer's interest was vested rather than contingent.

> ingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property. * * *

Since these provisions have wide application, and since the question is therefore likely to recur frequently, it is a matter of general importance in the administration of the revenue laws that the issue be authoritatively resolved.

II

AS TO THE SECURITIES PURCHASED BY THE TRUSTEE

3. Since the securities purchased by the trustee were not owned by the decedent at the date of death, their basis obviously could not relate back to their value as of the time of death. The Government contended that these securities were not acquired "by bequest, devise, or inheritance" within the meaning of Section 113 (a) (5) of the 1934 Act, and that therefore their basis must be "cost" under Section 113 (a). In rejecting that contention, the decision below is in substantial conflict with *Commissioner* v. *Maguire,* 111 F. (2d) 843 (C. C. A. 7th), certiorari granted October 14, 1940, No. 346, present Term. Although the applicable statutory provision in the *Maguire* case is Section 113 (a) (5) of the Revenue Act of 1928 which establishes different criteria for determining

basis of property acquired from a decedent, the decision is applicable to the extent that it held that securities purchased by a testamentary trustee are not to be treated as acquired by bequest, devise, or inheritance and are therefore to have a basis of cost. In any event, the question is so closely related to the issue in the *Maguire* case that it would be very helpful in the administration of the revenue laws to have the entire matter disposed of by this Court.

CONCLUSION

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

JANUARY 1941.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

*   *   *   *   *

(5) *Property transmitted at death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * * [U. S. C., Title 26, Sec. 113.]

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 113 (a) (5)-1. BASIS OF PROPERTY ACQUIRED BY BEQUEST, DEVISE, OR INHERITANCE.—(a) *Property included.*—Section 113 (a)(5) applies—

(1) to all property passing from a decedent by his will or under the law governing the descent and distribution of property of decedents; and

(2) to property passing under an instrument which, under section 113 (a) (5) is treated as though it were a will, but applies to such property only at the times and to the extent prescribed in section 113 (a) (5).

(b) *Basis.*—Under the law governing wills and the descent and distribution of the property of decedents, all titles to prop-

erty acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113 (a) (5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property. For example, if distribution of personal property left by a decedent is not made until one year after his death, the basis of such property in the hands of the legatee is its fair market value at the time when the decedent died, and not when the legatee actually received the property; or, if the bequest is of the residue to trustees in trust, and the executors do not distribute the residue to such trustees until five years after the death of the decedent, the basis of each piece of property left by the decedent and thus received, in the hands of the trustees, is its fair market value at the time when the decedent dies; or, if the bequest is to trustees in trust to pay to A during his lifetime the income of the property bequeathed, and after his death to distribute such property to the survivors of a class, and upon A's death the property is distributed to the taxpayer as the sole survivor, the basis of such property, in the

hands of the taxpayer, is its fair market value at the time when the decedent died.

The purpose of the Act, in prescribing a single uniform basis rule for property acquired by bequest, devise, or inheritance, is, on the one hand, to tax the gain, in respect of such property, to him who realizes it (without regard to the circumstance that at the death of the decedent it may have been quite uncertain whether the taxpayer would take or gain anything); and, on the other hand, not to recognize as gain any element of value solely from the circumstance that the possession or enjoyment of the taxpayer was postponed. Such postponement may be, for example, until the administration of the decedent's estate is completed, until the period of the possession or enjoyment of another has terminated, or until an uncertain event has happened. It is the increase or decrease in the value of property reflected in a sale or other disposition which Section 113 (a) (5) recognizes as the measure of gain or loss.

* * * * *

(d) *Property acquired before March 1, 1913; reinvestments by fiduciary.*—* * *

If the property is an investment by the fiduciary under a will (as, for example, in the case of a sale by a fiduciary under a will of property transmitted from the decedent, and the reinvestment of the proceeds), the cost or other basis to the fiduciary is taken in lieu of the fair market value at the time when the decedent died.

U. S. GOVERNMENT PRINTING OFFICE: 1941

BLANK PAGE

BLANK PAGE

BLANK PAGE

In the Supreme Court of the United States

October Term, 1940

No. 684

Guy T. Helvering, Commissioner of Internal Revenue, petitioner

v.

Richard J. Reynolds

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO REVERSE

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, moves that the judgment of the court below in the present case be reversed, upon the authority of *Maguire* v. *Commissioner,* No. 346 this Term, *Helvering* v. *Gambrill,* No. 472 this Term, and *Helvering* v. *Campbell* and related cases, Nos. 473, 474, and 475 this Term, all decided March 31, 1941.

This case involves two questions: (1) Whether, under Section 113 (a) (5) of the Revenue Act of

305393—41

1934, the basis for securities which passed to respondent from his father through a testamentary trust is their value at the date of the father's death, as the Government contends, or their value at the date of delivery by the trustee to respondent. (2) Whether the basis for other securities which were purchased by the testamentary trustee and subsequently delivered to respondent is their cost to the trustee, as the Government contends, or their value at the date of delivery by the trustee to respondent.

Both of these questions are, it is submitted, resolved in the Government's favor by the cases above cited.

I

1. Respondent conceded below (R. 44) that his basis for the property passing to him from his father through the testamentary trust was its value at the time of his father's death, if he had a vested interest in the property under his father's will. All that respondent contended, and all that the court below held, was that his interest was contingent rather than vested, and that respondent's "acquisition" for basis purposes, therefore, did not occur until the contingency took place. This contention that the result turns on whether respondent's interest under his father's will was vested or contingent is now squarely foreclosed by the decisions in the *Campbell* and *Maguire* cases. See also *Helvering* v. *Hallock,* 309 U. S. 106; *Van Vranken* v. *Helvering,* 115 F. (2d)

709 (C. C. A. 2d), pending on petition for certiorari, No. 836 this Term.

2. The question here of respondent's basis for the property coming to him from his father is the same as one of the questions decided in the *Maguire, Gambrill,* and *Campbell* cases, except that the present case involves the Revenue Act of 1934 while those cases arose under the revenue acts of 1928 and 1932. Section 113 (a) (5) of the Revenue Act of 1934, and the comparable provisions of all other revenue acts since the 1921 act, with the exception of the 1928 and 1932 acts, provide that the basis for property "acquired by bequest, devise, or inheritance * * * shall be the value of such property at the time of such acquisition." Section 113 (a) (5) of the 1928 and 1932 acts provides, on the other hand, that the basis for general bequests "acquired either by will or by intestacy" shall be the value "at the time of the distribution to the taxpayer." In the *Maguire* and other cases, the Court held that under the 1928 and 1932 acts the basis for property passing to a taxpayer from the decedent through a testamentary trust is the value of the property at the time it was distributed by the executors to the trustees, and not its value when it was distributed by the trustees to the taxpayer. The Court held, in other words, that the "distribution" referred to in the acts is the distribution made out of the estate, and not any subsequent transmission.

In reaching this conclusion the Court first decided in the Government's favor the question presented in the present case, that is that the date of death was the time of "acquisition" under the acts other than those of 1928 and 1932, and then considered the question of how great a departure from this rule was indicated under the 1928 and 1932 acts by the phrase "time of the distribution"; the Court repeatedly stated that its inquiry was the extent of the 1928 departure from the "value-at-death rule." *Maguire* opinion, pp. 3-4. Too, the Court relied on *Brewster* v. *Gage*, 280 U. S. 327, which held under the earlier acts that the date of death was the date of "acquisition" in the case of a residuary legatee who received the property directly from the executors. *Maguire* opinion, p. 5. Obviously, *Brewster* v. *Gage* is even more apposite here. Again, the legislative history of the reversion in the 1934 act to the form of the pre-1928 acts, set out in the *Maguire* opinion, p. 4, note 10, requires resolution of the present question in favor of the Government. Finally, the arguments in the *Maguire* opinion, p. 5, that Congress cannot have intended "to allow trustees either to sell the property or to distribute it in kind, as would be most advantageous for tax purposes" or "to create substantial periods of time following the date of death during which the value of the property bequeathed would have no incidence as respects subsequent gains or losses," are equally applicable to the present case.

3. This Court's decision in the *Gambrill* case is even more conclusive of this phase of the present case than is the *Maguire* decision. Section 101 (c) (8) of the Revenue Act of 1928 defines capital assets as "property held by the taxpayer for more than two years." In the *Gambrill* case the Court held that the two-year holding period under this section is to be measured from the date of the decedent's death, in the case of property which was owned by the decedent and which passed to the taxpayer through a testamentary trust, and not from the date of delivery by the trustees to the taxpayer. And in *McFeely* v. *Commissioner,* 296 U. S. 102, 109, relied on in the *Gambrill* decision, the Court held that "The date for ascertaining the basic value, and the date of commencement of the two year holding period were, therefore, under these Acts [i. e., the acts before 1928], identical."

4. This Court's decision in the *Campbell* and related cases is also independently conclusive of the present case. There the Court held that for purposes of the "first-in-first-out" rule the date of death was "the date of acquisition" for shares which came to the taxpayer from the decedent through a testamentary trust. It seems quite clear that "acquisition" for basis purposes under the acts other than 1928 and 1932 occurs at the same time as acquisition for purposes of the "first-in-first-out" rule.

II

The second question here presented has been resolved in the Government's favor by the *Maguire* decision. There the Court held that securities purchased by testamentary trustees were not acquired "by will or by intestacy" within Section 113 (a) (5) of the 1928 act, and that therefore their basis was "cost" under Section 113 (a). While the 1934 act (and the acts before 1928) employs the phrase "by bequest, devise, or inheritance," these words are plainly synonymous with "by will or by intestacy." The title of Section 113 (a) (5), "Property transmitted at death," relied on in the *Maguire* decision (p. 6), is the same in both acts, and the different terminology in the 1928 act is obviously but a chance result of the rephrasing incident to according separate treatment to realty and to specific bequests of personalty.

Respectfully submitted.

Francis Biddle,
Solicitor General.

April 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

BLANK PAGE

BLANK PAGE

BLANK PAGE

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	3
Specification of errors to be urged	5
Summary of argument	6
Argument:	
I. For securities which had been owned by the decedent, the time of acquisition by the taxpayer, under Section 113 (a) (5) of the Revenue Act of 1934, was the date of decedent's death	9
II. For securities which were purchased by the trustee, the basis for computing gain or loss is the cost to the trustee, under Section 113 (a) of the Revenue Act of 1934	27
Conclusion	31
Appendix	32

CITATIONS

Cases:

Archbold v. *Helvering*, 115 F. (2d) 1005, pending on petitions for certiorari, Nos. 792–795, this Term	17
Augustus v. *Commissioner*, decided February 14, 1941, 1941 C. C. H., Vol. 4, Par. 9255, pending on petition for certiorari, No. 819, this Term	17
Biddle v. *Commissioner*, 302 U. S. 573	15
Brewster v. *Gage*, 280 U. S. 327	9, 11, 12, 13, 14, 16, 19, 24
Burnet v. *Harmel*, 287 U. S. 103	26
Cary v. *Helvering*, 116 F. (2d) 800, pending on petitions for certiorari, Nos. 734–737, this Term	17
Hartley v. *Commissioner*, 295 U. S. 216	13
Helvering v. *Campbell*, Nos. 473, 474, and 475, this Term, decided March 31, 1941	7, 17, 22, 23, 24, 25, 26
Helvering v. *Gambrill*, No. 472, this Term, decided March 31, 1941	7, 17, 20, 22, 25, 26
Helvering v. *Hallock*, 309 U. S. 106	26
Helvering v. *N. Y. Trust Co.*, 292 U. S. 455	15
Helvering v. *Wilshire Oil Co.*, 308 U. S. 90	17
Helvering v. *Winmill*, 305 U. S. 79	13

Cases—Continued. Page

Lane v. *Corwin*, 63 F. (2d) 767, certiorari denied, 290 U. S. 644 .... 15, 16
Lyeth v. *Hoey*, 305 U. S. 188 25
Maguire v. *Commissioner*, No. 346, this Term, decided March 31, 1941 .... 7, 8, 11, 17, 18, 19, 25, 26, 28, 30
McFeely v. *Commissioner*, 296 U. S. 102 22
Morgan v. *Commissioner*, 309 U. S. 78 26
Morrissey v. *Commissioner*, 296 U. S. 344 17
Murphy Oil Co. v. *Burnet*, 287 U. S. 299 17
Pringle v. *Commissioner*, 64 F. (2d) 863, certiorari denied 290 U. S. 656 .... 15, 16
Van Vranken v. *Helvering*, 115 F. (2d) 709, pending on petition for certiorari, No. 836, this Term 17

Statutes:

Revenue Act of 1928, c. 852, 45 Stat. 791:
- Sec. 101 (c) (8) 21
- Sec. 113 (a) 10, 18, 28

Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 113 11
Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 113 (a) (U. S. C., Title 26, Sec. 113) 6, 7, 8, 9, 10, 12, 14, 26, 27, 28, 29, 30, 31, 32

Miscellaneous:

G. M. C. 10260, XI–1 Cum. Bull. 79 15
H. Rept. No. 1, 70th Cong., 1st Sess 10
H. Rept. No. 2, 70th Cong., 1st Sess, p. 18 10
H. Rept. No. 704, 73d Cong., 2d Sess., p. 28 12
O. D. 727, 3 Cum. Bull. 53 (1920) 15
S. Rept. No. 960, 70th Cong., 1st sess., p. 26 .... 10, 11
S. Rept. No. 558, 73d Cong., 2d Sess., p. 34 12
Treasury Regulations 33 (1918 Revision):
- Art. 4, Par. 44 15

Treasury Regulations 45, Art. 1562 .... 10, 15
Treasury Regulations 62, Art. 1563 15
Treasury Regulations 65, Art. 1594 15
Treasury Regulations 69, Art. 1594 15
Treasury Regulations 86:
- Art. 113 (a) (2)–1 31
- Art. 113 (a) (3)–1 31
- Art. 113 (a) (5)–1 .... 6, 13, 27, 30, 32

Treasury Regulations 94, Art. 113 (a) (5)–1 .... 13, 27
Treasury Regulations 101, Art. 113 (a) (5)–1 .... 13, 27
Treasury Regulations 103, Sec. 19.113 (a) (5)–1 .... 13, 27

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 684

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RICHARD J. REYNOLDS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 28) is reported in 41 B. T. A. 59. The opinion of the Circuit Court of Appeals (R. 41) is reported in 114 F. (2d) 804.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 7, 1940. (R. 55.) The petition for a writ of certiorari was filed on January 7, 1941, and was granted on February 17, 1941. (R. 57.) The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Pursuant to a testamentary trust established under the will of the taxpayer's father, the taxpayer's share was distributed to him when he became 28 years of age. He thus received not only securities formerly owned by the decedent but also other securities purchased by the trustee. During the year 1934, the taxpayer sold securities of both groups, and the questions presented relate to the proper basis for determining gain or loss upon these sales, namely:

1. Whether, under Section 113 (a) (5) of the Revenue Act of 1934, and the regulations promulgated thereunder, the basis of the first group of securities is their value at the date of decedent's death, rather than their value at the date of delivery by the trustee to the taxpayer when he became 28 years of age; and

2. Whether the basis of the second group of securities is their cost to the trustee rather than their value at the date of delivery by the trustee to the taxpayer.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix, *infra*, pp. ~~32-34~~. 31-33

STATEMENT

Taxpayer is the beneficiary under a trust created by the will of his father who died July 19, 1918.

(R. 24.) By his will,[1] the father provided that the residue of his estate should be divided, one-third to his wife absolutely (with certain qualifications), and the remaining two-thirds to his children and the living issue of any deceased child, *per stirpes,* to be equally divided among them, share and share alike, subject, however, to the conditions of a specified trust. (R. 16.)

Under the trust created for the benefit of the children the trustee was directed to collect the income and, until they severally arrived at the age of 21, to pay to the wife, out of their respective shares, so much as she deemed necessary or requisite for their support, maintenance, and education. (R. 17.) The trustee was given similar discretion in the event that the wife should die before any of the children should become 21. (R. 17.)

The will then provided that after each child arrived at the age of 21 and until they respectively attained the age of 28, the trustee was authorized and directed to pay to each of them, out of his or her respective share, $5,000 per annum, unless, in the opinion of the wife, that amount was inade-

---

[1] For convenience, all references herein to the will are to the extracts therefrom in Exhibit B attached to the taxpayer's petition filed with the Board of Tax Appeals. (R. 16.) The will is set out in full in Exhibit A, which is referred to in paragraph 3 of the Stipulation of Facts. (R. 24.) Since Exhibit A is voluminous, it was stipulated by the parties on December 27, 1940 (R. 56), that it need not be printed but that it be separately certified and as such made a part of the record by reference.

quate. In that event, at the written request of the wife, the trustee was authorized and directed to enlarge the annual payment by whatever amount the wife designated, not in excess of $50,000. (R. 17.)

Should the wife die while any of the children were between the ages of 21 and 28, the trustee was authorized to pay to each child $50,000 per annum. The balance of the income was to be accumulated until each child was 28, at which time the trustee was directed to pay his or her share of the corpus of the estate, together with the accumulated income. (R. 17–18.)

In the event that any child should die before arriving at the age of 28, such child was in effect given a general testamentary power of appointment over his or her share. (R. 18.) Provision was then made for other disposition in the event of default of exercise of the power of appointment. (R. 18–19.)

The trustee received the trust assets from the estate in 1926 and distributed the taxpayer's share, including securities, to him on April 4, 1934, when he became 28. Some of the securities so distributed had been received by the trustee from the decedent's estate and others had been acquired by the trustee in intermediate transactions. Taxpayer sold some of the securities during the year 1934 at a profit. In computing gain, he used as the basis the value on April 4, 1934, when he received them from the trustee. (R. 28.)

The Commissioner determined that the proper basis was the value of the securities at the time of the father's death in the case of those then held by the father, and their cost to the trustee in the case of those which it had acquired thereafter. (R. 10.)

The Board of Tax Appeals sustained the Commissioner's determination. (R. 29.) On appeal to the Circuit Court of Appeals the decision of the Board was reversed. (R. 55.)

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that the basis for the determination of the taxpayer's gain or loss upon the sale by him in the taxable year 1934 of securities which were distributed to a testamentary trustee under the terms of his father's will and by the trustee to the taxpayer as a part of his share under the will when he became 28 years of age was their value at the date of the distribution to him.

2. The court below erred in holding that the basis for the determination of the taxpayer's gain or loss upon the sale by him in the same taxable year of securities which were acquired by the trustee in intermediate transactions but were likewise distributed to the taxpayer by the trustee as a part of the taxpayer's share under the will when he reached the age aforesaid was their value at the time of their distribution to the taxpayer aforesaid.

3. The court below erred in reversing the decision of the Board of Tax Appeals which had af-

firmed the Commissioner's determination that the taxpayer's basis for gain or loss upon the sale by him in the taxable year of the securities mentioned in the first specification of error was their value at the time of his father's death and that the basis for gain or loss upon the sale by the taxpayer in that year of the securities mentioned in the second specification of error was their cost to the trustee.

4. The court below erred in invalidating or failing to give effect to Article 113 (a) (5)–1 of Treasury Regulations 86.

SUMMARY OF ARGUMENT

I. For securities which had been owned by the decedent, the time of acquisition by the taxpayer, under Section 113 (a) (5) of the Revenue Act of 1934, was the date of the testator's death.

Section 113 (a) (5) of the Revenue Act of 1934 provides that where property is "acquired by bequest, devise, or inheritance", the basis for computing gain or loss "shall be the fair market value of such property at the time of such acquisition." Treasury Regulations 86, Appendix, *infra*, pp. ~~32~~– 31– 33 ~~34~~, interpreting this provision, hold that the "time of such acquisition" is the date of death of the decedent, regardless of whether the interest of the taxpayer was "vested" or "contingent" at such time. The taxpayer and the court below conceded that if the interest acquired by the taxpayer was "vested" the date of "acquisition" would be the date of the testator's death but asserted that the

interest was "contingent" under North Carolina law and that therefore the time of acquisition was the date when such contingency was finally resolved by actual delivery of the *corpus* to the taxpayer.

The legislative history of Section 113 (a) (5) makes clear that no such distinction between "vested" and "contingent" interests was contemplated by Congress. On the contrary, it is apparent that Congress intended the date of the decedent's death to govern in all cases of property passing by bequest, devise, or inheritance, regardless of the nature of the taxpayer's interest as remainderman.

The issue is now conclusively settled by the recent decisions of this Court in *Maguire* v. *Commissioner*, No. 346 this Term, which proceeded upon the theory that the "time of . . . acquisition" in the Revenue Acts prior to 1928 and subsequent to 1932 meant the date of the testator's death even where the taxpayer's interest was conditional or contingent; in *Helvering* v. *Gambrill*, No. 472 this Term, which ruled that the two-year holding period for the purpose of determining capital assets is to be measured from the date of the decedent's death despite an intervening trust similar to that in the case at bar; and in *Helvering* v. *Campbell* and related cases, Nos. 473, 474, and 475 this Term, which ruled that the date of acquisition for purposes of the "first-in-first-out" rule was the date of the decedent's death, again irrespective of whether the taxpayer's interest was "vested" or "contingent."

The rule embodied in the Treasury Regulations is supported by other considerations, including (1) that the general statutory scheme contemplates that there be no gap in the continuity of the basis following the decedent's death; (2) that the application of a Federal tax statute should not depend upon the variations and complexities of local law, especially where the resulting distinctions involve merely form rather than substance; and (3) that no substantial basis can be advanced for making a distinction between "vested" and "contingent" interests.

II. For securities which were purchased by the trustee, the basis for computing gain or loss is the cost to the trustee, under Section 113 (a) of the Revenue Act of 1934, and not the value on the date of delivery by the trustee to the taxpayer.

The general provision establishing cost under Section 113 (a) is applicable and not the exception under Section 113 (a) (5). The phrase "acquired by bequest, devise, or inheritance" in Section 113 (a) (5) does not apply to property purchased by testamentary trustees. This issue is plainly controlled by the *Maguire* decision, *supra.*

To construe the statute as permitting the taxpayer to use as a basis value at time of distribution at the termination of a testamentary trust would create a period, frequently of lengthy duration, during which changes in value would be without tax

effect. Similarly, it would enable a trustee to sell trust property or distribute it in kind, according to which course would secure an advantageous basis for determining gain or loss.

ARGUMENT

I

FOR SECURITIES WHICH HAD BEEN OWNED BY THE DECEDENT, THE TIME OF ACQUISITION BY THE TAXPAYER, UNDER SECTION 113 (a) (5) OF THE REVENUE ACT OF 1934, WAS THE DATE OF DECEDENT'S DEATH

Section 113 (a) (5) of the Revenue Act of 1934, Appendix, *infra*, p. 32, provides that where property is "acquired by bequest, devise, or inheritance," then "the basis shall be the fair market value of such property at the time of such acquisition." Treasury Regulations 86, Appendix, *infra*, pp. ~~32–34~~ 31-33, interpreting this provision, hold that the "time of such acquisition" is the date of death of the decedent, regardless of whether the interest of the taxpayer was "vested" or "contingent" at such time.

Both the taxpayer and the court below conceded that if the taxpayer's interest were "vested" at the date of his father's death, then that date would be the date of "acquisition" within the meaning of Section 113 (a) (5). This follows plainly from the decision of this Court in *Brewster* v. *Gage*, 280 U. S. 327, discussed hereinafter. However, the court below held that the interest of the taxpayer

here involved was "contingent" under North Carolina law,[2] and that therefore the time of acquisition under the statute was the date the contingency was finally resolved—i. e., the date of actual delivery to the taxpayer when he became 28 years of age.

A brief survey of the legislative history of Section 113 (a) (5) shows that Congress intended to make no such distinction between "vested" and "contingent" interests. Under Treasury Regulations interpreting the Revenue Act of 1918[3] and by express provision of the Acts of 1921, 1924, and 1926 "the time of * * * acquisition" was the critical date for valuing property passing at death. Considerable litigation arose as to the meaning of the phrase and as a consequence the statutory provisions were amended in the Revenue Act of 1928.[4] As introduced in the House, the bill which became the Revenue Act of 1928 (H. Rept. No. 1, 70th Cong., 1st Sess.) provided, in Section 113 (a) (5), that the basis for all property acquired by bequest, devise, or inheritance should be the value of the property at the date of decedent's death. The Senate Committee, declaring the House ver-

[2] The question of whether the taxpayer's interest was "vested" or "contingent" under North Carolina law is not before this Court, that issue being expressly excluded by the order granting certiorari (R. 57).

[3] Regulations 45, Article 1562.

[4] H. Rept. No. 2, 70th Cong., 1st Sess., p. 18; S. Rept. No. 960, 70th Cong., 1st Sess., p. 26.

sion inadequate in certain minor situations,[5] rewrote the provision in the form finally passed.[6] As this Court said in *Maguire* v. *Commissioner*, No. 346, this Term, "There does not appear to be the slightest suggestion that this change was designed as a substantial departure from the value-at-death rule."

The language of the 1928 Act was retained in the Act of 1932.[7]

In the meantime, however, this Court decided *Brewster* v. *Gage*, 280 U. S. 327. That case involved personal property acquired by a residuary legatee and sold in 1921 and 1922, and was decided under the Revenue Acts of 1918 and 1921. As just stated, the latter Act, and the regulations under the former Act, specified value at the time of "acquisition" as the basis for property acquired by bequest, devise, or inheritance. The Court held that the time of "acquisition" was the date of the

---

[5] The Senate Committee Report shows that the situations it had in mind arose where the executor purchased property after the death of the testator and where property was transferred in contemplation of death, the donee selling the property while the donor was still living. S. Rept. No. 960, 70th Cong., 1st Sess.

[6] In cases of specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis was to be the value at the time of the death of the decedent. In all other cases the basis was the value of the property at the time of distribution to the taxpayer. 45 Stat. 791, 818.

[7] 47 Stat. 169, 199.

decedent's death, and not the date the executors distributed the property.

In the Revenue Act of 1934, Congress returned to the form used in the Acts prior to 1928, namely, the value "at the time of . . . acquisition." It did so because it considered that the decision in *Brewster* v. *Gage, supra,* settled the proposition that "time of acquisition" meant the date of death of the decedent in all cases of property passing by bequest, devise, or inheritance. The reports of the House and Senate Committees explain the reversion to the previous provision as follows:

> Section 113 (a) 5 of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to the meaning of the term "date of acquisition", which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined "the date of acquisition" to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster* v. *Gage,* 280 U. S. 327.) Section 113 (a) 5 of the House bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal. (H. Rep. No. 704, 73d Cong., 2d Sess., p. 28; S. Rep. No. 558, 73d Cong., 2d Sess., p. 34.)

Following the passage of the 1934 Act, Treasury Regulations 86 expressly interpreted Section 113 (a) (5) as follows:

> Under the law governing wills and the descent and distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113 (a) (5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents.

The provision, as thus interpreted, has been reenacted without change in ensuing years and remains unchanged at this time.[8] Under the familiar rule of construction, this Regulation, prospective in application, must be deemed to have legislative approval and should not be lightly disregarded. *Brewster* v. *Gage,* 280 U. S. 327, 337; *Hartley* v. *Commissioner,* 295 U. S. 216; *Helvering* v. *Winmill,* 305 U. S. 79.

---

[8] Internal Revenue Code, Section 113 (a) (5). The Treasury Regulation has been repeated in Treasury Regulations 94 and 101, Article 113 (a) (5)-1 (promulgated under the Revenue Acts of 1936 and 1938, respectively); Treasury Regulations 103, Section 19.113 (a) (5)-1 (promulgated under the Internal Revenue Code).

Thus the uniform use of the phrase "time of such acquisition" in Treasury Regulations and Revenue Acts prior to 1928; the clarification proposed by the House Committee in the 1928 bill which specifically fixed the time of acquisition as the date of the decedent's death; the modification proposed by the Senate Committee, and finally passed, which was clearly not intended to make any substantial change in the value-at-death rule; the decision in *Brewster* v. *Gage;* the reversion in 1934 to the phrase "time of such acquisition," expressly made because the Supreme Court was believed to have clarified the phrase by the *Brewster* decision to mean "the date of death in the case of all property passing by bequest, devise and inheritance;" the issuance of Treasury Regulations 86 interpreting the provision as applying irrespective of the nature of the remainderman's interest; the reenactment of the provision without change, and in the face of this interpretation, in subsequent Revenue Acts; the complete absence of any suggestion throughout that Congress intended to make any distinction between "vested" and "contingent" interests as affecting the date of acquisition—all these factors, in our opinion, make clear that the interpretation here contended for is that which was contemplated and sanctioned by Congress.

The court below, in discussing the legislative history of Section 113 (a) (5), relied upon certain

Office Decisions of the Treasury Department[9] and upon certain decisions of the lower Federal courts[10] as showing that, prior to the enactment of the 1934 Revenue Act, the provision had come to mean that if the interest of the remainderman was contingent the basis of valuation was the date of resolution of the contingency. It is argued that, in restoring the provision in the 1934 Act, Congress must have meant to incorporate this meaning.

It should be observed, however, as this Court has held, that Office Decisions have none of the force and effect of Treasury Decisions and do not commit the Department to any interpretation of the law.[11] On the other hand, Treasury Regulations applicable to the Acts prior to 1928 consistently stated that the basis of property acquired by bequest, devise, or inheritance should be the value at date of such acquisition, making no distinction between "vested" and "contingent" interests.[12]

---

[9] O. D. 727, 3 Cum. Bull. 53 (1920); G. C. M. 10260, XI-1 Cum. Bull. 79, 80.

[10] Particularly *Pringle* v. *Commissioner*, 64 F. (2d) 863 (C. C. A. 9th), certiorari denied, 290 U. S. 656; *Lane* v. *Corwin*, 63 F. (2d) 767 (C. C. A. 2d), certiorari denied, 290 U. S. 644.

[11] *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 468. See the cautionary notice published on the face of the bulletins containing these rulings. See, also, *Biddle* v. *Commissioner*, 302 U. S. 573, 582.

[12] Treasury Regulations 33 (1918 Revision), Article 4, Par. 44 (1916 Act); Treasury Regulations 45, Article 1562 (1918 Act); Treasury Regulations 62, Article 1563 (1921 Act); Treasury Regulations 65 (1924 Act) and 69 (1926 Act), Article 1594.

With regard to the *Pringle* and *Lane* decisions, upon which the court below relied, it should be noted that there is no evidence Congress took such decisions into consideration in making the change back to the present provision in the 1934 Act. On the contrary, the Committee Reports, quoted *supra*, indicate quite clearly that Congress considered the Supreme Court decision in *Brewster* v. *Gage* as ending ambiguity and establishing a uniform rule that time of acquisition meant date of death in all cases of property acquired by bequest, devise, or inheritance.

Under these circumstances, and in view of the considerations set forth below, the enactment of the provision in the Act of 1934, after the intermediate Acts of 1928 and 1932 had contained different provisions, left the Treasury Department free to adopt reasonable regulations of interpretation. Certainly the informal departmental rulings referred to above had not become "frozen into another act merely by reenactment of that provision, so that that administrative interpretation cannot be changed prospectively through exercise of appropriate rule-making powers". *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100–101; *Morrissey* v. *Commissioner*, 296 U. S. 344, 355; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, 303, 306–307. And beginning in 1934 the regulations have expressly provided that property acquired by

bequest, devise, or inheritance is acquired at the decedent's death, whether the taxpayer's interest was then vested or contingent. It is noteworthy that, contrary to the court below, the two other Circuit Courts of Appeals passing upon the question as raised in the 1934 Act and subsequent Acts have upheld the Treasury Regulation.[13]

In any event, the issue is now settled by the recent decisions of this Court in *Maguire* v. *Commissioner*, No. 346 this Term, *Helvering* v. *Gambrill*, No. 472 this Term, and *Helvering* v. *Campbell* and related cases, Nos. 473, 474 and 475, this Term, all decided March 31, 1941.

The *Maguire* case involved property received by the taxpayer pursuant to a testamentary trust similar in all essential respects with that involved in the case at bar.[14] The *Maguire* case arose, how-

---

[13] *Van Vranken* v. *Helvering*, 115 F. (2d) 709 (C. C. A. 2d), pending on petition for certiorari, No. 836 this Term; *Cary* v. *Helvering*, 116 F. (2d) 800 (C. C. A. 2d), and related cases, pending on writs of certiorari, Nos. 734–737 this Term; *Archbold* v. *Helvering*, 115 F. (2d) 1005 (C. C. A. 2d), and related cases, pending on petitions for certiorari, Nos. 792–795 this Term; *Augustus* v. *Commissioner* (C. C. A. 6th) decided February 14, 1941, not yet officially reported but found in 1941 C. C. H. Vol. 4, Par. 9255, pending on petition for certiorari, No. 819, this Term.

[14] The will, pursuant to which the taxpayer received the property, directed the executors and trustees, not less than ten and not more than twenty years after the death of the testator, to make final distribution of this residue as follows: "* * * to my wife the one-third part thereof, the balance to be equally divided among my children, share and share alike, and should my wife not be living at the time of such

ever, under Section 113 (a) (5) of the Revenue Act of 1928, which provided that as to personalty acquired by general bequest the basis of valuation was the value "at the time of the distribution to the taxpayer." The Court held that this meant the value when received by the trustees from the executors and not the value at the date of delivery by the trustees to the taxpayer. The underlying basis for the decision was that Congress had not intended in Section 113 (a) (5) of the 1928 Act to depart substantially from its "value-at-death" principle as expressed in Acts prior to 1928, in other provisions of the 1928 and 1932 Acts, and in the Acts subsequent to 1932. Since the Acts prior to 1928 and subsequent to 1932 fixed the basis for valuation at the "time of * * * acquisition" it follows that the Court considered this to mean the date of death, regardless of whether the taxpayer's interest was conditional or contingent. This is apparent throughout the Court's opinion. Thus, speaking of the rights established under the trust in the *Maguire* case, the Court says:

> "Distribution to the taxpayer" is not necessarily restricted to situations where property is delivered to the taxpayer. It also aptly describes the case where prop-

---

distribution, then the same shall be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent, * * *."

> erty is delivered by the executors to trustees in trust for the taxpayer. Such distribution of the estate results in the acquisition by the taxpayer of an equitable estate under the testamentary trust. The fact that he does not then obtain possession or control, the fact that his interest is conditional or contingent, the fact that legal title may not be transferred to him until years later, are immaterial.

With reference to *Brewster* v. *Gage,* the Court said:

> In *Brewster* v. *Gage,* 280 U. S. 327, 334, this Court held under earlier acts that the date of death was the date of "acquisition" even in case of a residuary legatee whose interest at the date of death clearly was not absolute. That conclusion suggests that the critical date is the time when the legatee acquires some interest in the property although his interest then may not be unconditional.

Other reasons given by the Court for its decision in the *Maguire* case are equally applicable here. Thus, Congress cannot have intended "to allow trustees either to sell the property or to distribute it in kind, as would be most advantageous for tax purposes." Likewise, "we cannot assume in absence of explicit provisions that Congress intended to create substantial periods of time following the date of death during which the value of the property bequeathed would have no incidence as respects subsequent gains or losses."

The *Gambrill* case is even more conclusive. There the taxpayer was a remainderman under the will of his grandmother, who died in 1897.[15] In May 1928 the trustees delivered the *corpus* to the taxpayer. The question arose whether a certain portion of the property owned by the decedent at the time of her death and sold by the taxpayer less than 2 years after May 1928 had been "held by the taxpayer for more than two years" and was therefore a capital asset within the meaning of Section 101 (c) (8) of the Revenue Act of 1928. The Court held that the two-year holding period under

[15] Respondent was the sole surviving issue of his mother, Anna Van Nest Gambrill, and took under the following provisions of his grandmother's will:

"NINTH. All the residue of my estate of every kind I give and devise as follows:

" 'One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

" 'The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of the said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living.' "

this Section is to be measured from the date of the decedent's death. This rule applied, the Court expressly declared, whether the taxpayer's remainder was vested or contingent at the time of the testator's death. The Court said:

> * * * respondent's interest, albeit a remainder, was acquired at the date of decedent's death for property then owned and at the date of purchase for property purchased by the trustees. The continuity in his holding was not broken by the intervening trust. The formal constitution of that trust though of special significance under § 113 (a) (5) (*Maguire v. Commissioner, supra*) did not change the basic quality of his property interest. And the fact that that interest did not ripen into full and complete ownership except by the passage of time or the occurrence of subsequent events is inconsequential. For § 101 (c) (8) (B) provides, as we have seen, that in determining the taxpayer's holding period there shall be included the period for which the property was held by any other person if under § 113 the property had the same basis in whole or in part in the taxpayer's hands as it would have in the hands of the other person. It is plain that under § 113 the basis to the trustees was the same as the basis to the taxpayer. Hence the period of their holding is not to be excluded from the period of the taxpayer's holding. That makes plain that "property held by the taxpayer" as

used in § 101 (c) (8) embraces not only full ownership but also any interest whether vested, contingent, or conditional. Otherwise the period of the holding by trustees would not be included in the holding by a mere remainderman. Hence, as in *McFeely* v. *Commissioner, supra,* we look to the time when the taxpayer first acquired the interest which later ripened into full ownership. It is plain that for property owned by the decedent he acquired that interest at her death and that for property purchased by the trustees he acquired that interest at the date of purchase.

Since, under the ruling in *McFeely* v. *Commissioner,* 296 U. S. 102, the date for commencement of the holding period is the same as the date of acquisition, the holding in the *Gambrill* case is equivalent to a holding on the precise issue raised by the case at bar.

This Court's decision in the *Campbell* and related cases is also independently conclusive of the present case. There the Court held that, for purposes of the "first-in-first-out" rule, the date of death was the "date of acquisition" for shares which came to the taxpayer from the decedent through a testamentary trust. To the contention of one of the taxpayers that "in view of the conditional nature of his remainder interest he held the securities only from the date when his interest became indefeasible and the securities were distributed to him," the Court said:

> As we indicated in *Maguire* v. *Commissioner, supra,* we are dealing only with a point of reference and a standard of value for determination of gains or losses realized on subsequent sales of property acquired by bequest, devise, or inheritance. For that purpose distinctions between vested and contingent remainders or between absolute and conditional property interests have no relevancy. Each remainderman has become the taxpayer because he has obtained possession and control of the property and has sold it. While the property is held in trust, the vested remainderman has no more rights of possession and control than the contingent remainderman. Yet each has acquired a property interest. The statutory provisions here in question come into play when that interest later ripens into full ownership and a sale is made. Hence the value of the property at the time when the taxpayer first acquires an interest in it has relevance to a subsequent determination of the gains or losses.

That the rule of *Brewster* v. *Gage, supra,* is applicable despite the nature of the taxpayer's interest in this case, the Court made clear:

> As we remarked in *Maguire* v. *Commissioner, supra,* the residuary legatee in *Brewster* v. *Gage,* 280 U. S. 327, was held to have acquired his interest at date of death though at that time it was not absolute. To be sure,

in these cases the interest of the remaindermen in the property at the earlier time was limited by the very terms of the bequest. But the tax here in question is not on their remainder interests; it is on gains realized by them as owners of that property. Hence, to carry into that computation the earlier value of the property is not to tax them on values which they never received. It merely provides a rule of thumb in alleviation of a tax which would be computed by reference to the entire amount of the original inheritance were it to be based on cost to the taxpayer.

It would seem beyond dispute that, particularly in view of the foregoing language, "acquisition" for basis purposes under the Acts other than 1928 and 1932 occurs at the same time as "acquisition" for purposes of the "first-in-first-out" rule. Consequently the holding in the *Campbell* case is again equivalent to a holding on the issue now before the Court.

In each of the above cases, as in the instant case, there was a possibility, as of the death of the decedent, that actual possession and enjoyment might never be realized by the taxpayer. This Court, however, did not concern itself with that question. For in such cases there has actually been a realization before the statute is invoked and the only real issue is the standard of value Congress has established for the determination of gain or loss.

Aside from the legislative history of the provision, and aside from the holdings in the *Maguire, Gambrill* and *Campbell* cases, the interpretation of "time of * * * acquisition" adopted by the Treasury Regulations is compelled by other important considerations:

(1) The interpretation embodied in the Treasury Regulations carries out the general statutory scheme that there be no gap in the continuity of the basis following the decedent's death. *Maguire* v. *Commissioner, supra.* The construction of the statute proposed by the respondent permits avoidance of taxes in cases where the property has changed in value between the date of death and the date of sale. Thus, if an intermediate date is selected as the basis date, part of an increment in value, accruing between the death and the date of sale, can escape taxation altogether.

(2) The application of a Federal tax statute should not depend upon the variations and complexities of local law, especially where the resulting distinctions involve mere form rather than substance. *Lyeth* v. *Hoey,* 305 U. S. 188, 193–194; *Morgan* v. *Commissioner,* 309 U. S. 78, 80–81; *Burnet* v. *Harmel,* 287 U. S. 103. The Treasury rule makes for uniform and simple administration; the respondent's rule entails variety and complexity under many different state laws.

(3) The attempted distinction between vested and contingent remaindermen is illusory for tax

purposes. Each type of remainderman obtains an interest in the property immediately upon the death of the testator. Neither has control over the property while it is in the trustee's hands. The interest of a vested remainderman may be divested by the occurrence of a condition subsequent in essentially the same manner as the interest of a contingent remainderman may be defeated by the failure of a condition precedent. Moreover, even a vested remainderman normally cannot know until the trust terminates that any specific property may be his, since the trustee may sell it at any time. Thus, no real basis exists for any distinction that is significant for tax purposes. See *Helvering* v. *Hallock,* 309 U. S. 106.

We submit, therefore, that the Treasury Regulation is consistent with the language and structure of the statute, that it is in harmony with the purpose of Congress as shown by the legislative history of Section 113 (a) (5), and that it is squarely supported by the decisions of this Court in the *Maguire, Gambrill* and *Campbell* cases.

II

FOR SECURITIES WHICH WERE PURCHASED BY THE TRUSTEE, THE BASIS FOR COMPUTING GAIN OR LOSS IS THE COST TO THE TRUSTEE, UNDER SECTION 113 (a) OF THE REVENUE ACT OF 1934

Some of the property sold by the taxpayer had been bought by the testamentary trustee and was delivered to him on April 4, 1934, when he reached

the age of 28. The Government contends that the basis for computing the gain or loss on the sale of such property is "cost" under the general provision of Section 113 (a) and that the exception to the cost basis in Section 113 (a) (5) is not applicable.

It is clear that Section 113 (a) (5) was not intended to fix a basis for property purchased by testamentary trustees and delivered in kind to the beneficiary. This Section refers to property "acquired by bequest, devise, or inheritance." Property purchased by a testamentary trustee is acquired subsequent to the decedent's death and can not be said to have passed at his death. Consequently Article 113 (a) (5)-1 (d) of Treasury Regulations 86, Appendix, *infra*, p. ~~34~~ 33, provides that the basis for property purchased by testamentary fiduciaries shall be the "cost or other basis to the fiduciary" in lieu of the "fair market value at the time when the decedent died."[16]

This question has, we submit, been resolved in the Government's favor by the *Maguire* decision, *supra*. There this Court held that securities purchased by testamentary trustees were not acquired "by will or by intestacy" within Section 113 (a) (5) of the 1928 Act, and that therefore their basis

[16] To the same effect is Article 113 (a) (5)-1 (d) of Treasury Regulations 94 and 101, promulgated under the Revenue Acts of 1936 and 1938, respectively; Section 19.113 (a) (5)-1 (d) of Treasury Regulations 103, promulgated under the Internal Revenue Code.

was "cost" under Section 113 (a). While the 1934 Act (and the Acts before 1928) employs the phrase "by bequest, devise, or inheritance", these words are plainly synonymous with "by will or by intestacy." The title of Section 113 (a) (5), "Property transmitted at death," relied on in the *Maguire* decision, is the same in both Acts, and the different terminology in the 1928 Act is obviously but a chance result of the rephrasing incident to according separate treatment to realty and to specific bequests of personalty.

Other considerations upholding the Treasury Regulation may be stated briefly:

That Section 113 (a) (5) should not be construed to include property purchased by testamentary trustees which the decedent never owned is evident from a comparison of Section 113 (a) (5) and (a) (3) of the Revenue Act of 1934. The latter subsection provides:

> If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, * * *.

If the trustees of an *inter vivos* trust, pursuant to a power of investment and reinvestment, sold trust property and purchased other property with the proceeds, this Section could not be applied to the property so purchased by the trustees, since that property had no basis "in the hands of the

grantor." The proper basis for property so purchased by the trustee, whether in the hands of the trustee or of the beneficiary, is cost to the trustee.

The taxpayer's contentions and interpretation open an avenue for tax avoidance. If the trustees themselves sold property which they had purchased, the basis would necessarily be cost. To hold that a different basis prevails for the property in the hands of the beneficiaries would enable trustees either to sell the property or to distribute it in kind, as would be advantageous for tax purposes. Such a result is plainly unsound.

The court below stated that if Section 113 (a) (5) of the 1934 Act did not apply to a fiduciary's purchase, then no statutory provision was applicable. On the contrary, the general rule laid down in Section 113 (a) that "The basis of property shall be the cost of such property; * * *" is controlling. The rule clearly does not require that the basis shall be the cost to the particular taxpayer who sells the property. But even if it did, it would be fair to assume that the price paid by the fiduciary out of the estate held for the benefit of the taxpayer was cost to the taxpayer. See the *Gambrill* and *Campbell* cases, *supra*.

The court below interpreted Article 113 (a) (5)-1 (d) of Treasury Regulations 86, Appendix, *infra*, p. 34, as applicable only to purchases by fiduciaries acting for decedents who died before March 1, 1913. Even a casual examination of this Regulation shows that such a construction does violence

to both its form and purpose. The second paragraph of the Regulation covers all purchases by testamentary fiduciaries without regard to the date of the decedent's death, and was not intended to be limited by the first paragraph.

Finally, if it be assumed that Section 113 (a) (5) is the applicable provision, then, for the reasons stated in the first part of this brief, the date of valuation would be "the fair market value" at the "time of * * * acquisition," that is, on the date of purchase by the trustee. See the *Gambrill* and *Campbell* cases, *supra*. Such a basis, rather than the cost to the trustee, is plainly unsound. It follows that the applicable provisions must be the general provision of Section 113 (a) and not Section 113 (a) (5).

CONCLUSION

The decision of the court below should be reversed and the decision of the Board of Tax Appeals affirmed.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
THOMAS I. EMERSON,
NEWTON K. FOX,
Special Assistants to the Attorney General.

APRIL 1941.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (unadjusted) of property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(5) *Property transmitted at death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * * (U. S. C., Title 26, Sec. 113.)

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 113 (a) (5)-1. *Basis of property acquired by bequest, devise, or inheritance.*—(a) *Property included.*—Section 113 (a) (5) applies—

(1) to all property passing from a decedent by his will or under the law governing the descent and distribution of property of decedents; and

(2) to property passing under an instrument which, under section 113 (a) (5) is treated as though it were a will, but applies to such property only at the times and to the extent prescribed in section 113 (a) (5).

(b) *Basis.*—Under the law governing wills and the descent and distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even

though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113 (a) (5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property. For example, if distribution of personal property left by a decedent is not made until one year after his death, the basis of such property in the hands of the legatee is its fair market value at the time when the decedent died, and not when the legatee actually received the property; or, if the bequest is of the residue to trustees in trust, and the executors do not distribute the residue to such trustees until five years after the death of the decedent, the basis of each piece of property left by the decedent and thus received, in the hands of the trustees, is its fair market value at the time when the decedent dies; or, if the bequest is to trustees in trust to pay to A during his lifetime the income of the property bequeathed, and after his death to distribute such property to the survivors of a class, and upon A's death the property is distributed to the taxpayer as the sole survivor, the basis of such property, in the hands of the taxpayer, is its fair market value at the time when the decedent died.

The purpose of the Act, in prescribing a single uniform basis rule for property acquired by bequest, devise, or inheritance, is, on the one hand, to tax the gain, in respect of such property, to him who realizes it (without regard to the circumstance that at the death of the decedent it may have been quite uncertain whether the taxpayer would take or gain anything); and, on the other hand, not to recognize as gain any element of value solely from the circumstance that the possession or enjoyment of the taxpayer was postponed. Such postponement may be, for example, until the administration of the decedent's estate is completed, until the period of the possession or enjoyment of another has terminated, or until an uncertain event has happened. It is the increase or decrease in the value of property reflected in a sale or other disposition which Section 113 (a) (5) recognizes as the measure of gain or loss.

* * * * *

(d) *Property acquired before March 1, 1913; reinvestments by fiduciary.*—If the decedent died before March 1, 1913, the fair market value on that date is taken in lieu of the fair market value on the date of death, but only to the same extent and for the same purposes as the fair market value on March 1, 1913, is taken under section 113 (a) (14).

If the property is an investment by the fiduciary under a will (as, for example, in the case of a sale by a fiduciary under a will of property transmitted from the decedent, and the reinvestment of the proceeds), the cost or other basis to the fiduciary is taken in lieu of the fair market value at the time when the decedent died.

U. S. GOVERNMENT PRINTING OFFICE: 1941

BLANK PAGE

No. 684.

Supreme Court of the United States.

OCTOBER TERM, 1940.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

RICHARD J. REYNOLDS.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

MEMORANDUM FOR THE RESPONDENT.

J. GILMER KORNER, JR.,
404 Transportation Building,
Washington, D. C.,
Attorney for Respondent.

H. G. HUDSON,
STRATTON COYNER,
Of Counsel.

January, 1941.

BLANK PAGE

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 684.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,
v.
RICHARD J. REYNOLDS.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

MEMORANDUM FOR THE RESPONDENT.

The instant petition is grounded principally on the alleged conflict of the decision below with *Van Vranken* v. *Helvering*, 115 F. (2d) 709, decided by the Second Circuit Court of Appeals, and with *Archbold* v. *Helvering*, decided *per curiam* by the same court on the same day. Although the decision below is in conflict in result with those cases, respondent respectfully submits that the conflict is not one of principle, and that a reading of the opinion in *Van Vranken* serves to persuade that the decision below in the instant case is right.

However, if the Court finds that such a conflict exists as would justify a review by it, the writ would issue. Accordingly respondent neither acquiesces in the petition nor opposes it.

Respondent Prays That If Writ Is Granted It Be Confined to the Issue of the Construction of the Provisions of Section 113 (a) (5) of the Revenue Act of 1934.

If the Court finds that a reviewable conflict exists and grants the writ, respondent respectfully prays that the issue thereon

be confined by the Court to the Federal question involved in construction of sec. 113 (a) (5) of the Revenue Act of 1934, under which statutory provision the instant case arises.

It is respectfully submitted that, in his petition (pp. 7–8), the petitioner has sought to present an issue concerning which there is no conflict below. At top of p. 7, petitioner states that he will urge that the court below erred in holding that, under the terms of the will of respondent's father, the interest of the respondent in the securities in question was not a vested interest, but merely contingent.

Concerning that question there is no conflict below, and therefore there would appear to be no basis for granting a writ of certiorari to review that question.

It is clear that no conflict on that point exists between the decision below and the decisions in *Van Vranken*, *supra*, and *Archbold*, *supra*. The decision in the *Archbold* case was *per curiam*. The opinion in *Van Vranken* (on the same day) after reviewing the facts and the law favorable to respondent's decision below herein, said: "Were it not for the change in the attitude of the Supreme Court toward the common-law distinction between contingent and vested remainders (*Helvering* v. *Hallock*, 309 U. S. 106) we should therefore find it difficult to escape the force of reasoning in *Reynolds* v. *Commissioner*, *supra* (114 Fed. (2d) 804)." Again, at the close of its opinion, the Court said: "Therefore, while without *Helvering* v. *Hallock*, *supra* (309 U. S. 106), we should probably have felt obliged to hold that the statute incorporated the earlier rulings of the lower courts; * * *." The Court, in that decision, viewed the *Hallock* case as having "declared that the whole distinction of the common law between vested and contingent remainders was irrelevant" and that "it meant to jettison the distinction as an archaism."

It is clear that, in *Van Vranken's* case, the Court's view was that it was unimportant, and hence unnecessary, to decide whether the taxpayer acquired an estate or interest which was vested, contingent, conditional, legal, equitable, executory, or otherwise,—and that the decision would be the same regardless

of what interest or estate the respondent had at the date of his father's death.

In the instant case, however, the court below held that respondent did not acquire any vested interest in the trust estate at his father's death; that none of it would have vested in him unless and until he arrived at the age of 28 years; that this precise point had been definitely decided by the courts of the State of North Carolina; and that respondent's interest was contingent and not vested (R. 47).

In order to point up the decision of the court below on this question, respondent invites the attention of the Court to the following:

As recited in the petition (p. 4) the trust provided, inter alia, that:

> Should my wife die while any of my children are between the ages of twenty-one (21) and twenty-eight (28) years,[1] then, from and after her death, said Trustee will pay to each of my said children, out of his or her share of my estate, and provided he or she shall have arrived at the age of twenty-one (21) years, Fifty Thousand Dollars ($50.000) per annum, and is directed to accumulate all the balance of said income for his or her respective use *until he or she shall respectively attain the age of twenty-eight (28) years, when each of them shall become entitled to* and shall respectively receive from said Trustee his or her share of the corpus of my estate, together with the accumulated income aforesaid. (Italics supplied.)

Paragraph (7) of the trust is quoted in part in the petition (p. 5) but respondent respectfully calls attention to certain parts of said paragraph which are not quoted in the petition. That paragraph provides for the vesting of the trust estate under a number of given circumstances, viz. (1) death of a child leaving a will; (2) death of a child intestate and leaving issue; (3) death of a child intestate and without issue. In the first instance it was provided:

[1] The wife died in May, 1924, before respondent was 28 years of age. (Ex. A of Record, pp. 350–351.)

> *Should* any of my children die before he or she shall arrive at the age of twenty-eight (28) years, *then* the share of my estate *which would have been* payable to him or her, *had he or she arrived* at that age, *shall be continued* to be held by *my* said Trustee for the use and benefit of his or her devisees by Will *until the time* that such child *would have arrived* at the age of twenty-eight years, *if* he or she had lived, *when* the said trust shall cease and the estate shall then become payable to such devisees, * * *. (Italics supplied.)

In the second instance it was provided:

> but *should* any of my children die before that time without having disposed of any of his or her share by Will but leaving issue * * * the share of said deceased child shall continue to be held by my said Trustee *for the use and benefit of his or her children* * * * until the time *my child* so dying *would have arrived* at the age of twenty-eight (28) years, *if he or she had lived*, when the trust shall cease and the *estate shall then become vested* in his or her children, then surviving; * * * (Italics supplied.)

In the third instance it was similarly provided that if the child died intestate and without issue, the trust should be continued for his brother or sisters until such time as they, respectively, should arrive at the age of 28 years, when each of them should become entitled to his or her share of the corpus of the trust which should then vest in them.

The identical trust was construed by the courts of North Carolina. The Superior Court of Forsyth County is a court of general jurisdiction. It heard and decided the cause and entered judgment[1] as follows:

---

[1] See factual and jurisdictional findings in ¶¶ 25 and 35 of said judgment. Record, "Exhibit B," pp. 718, 722. In ¶ 35 the Court said:

> That thereafter a further question arose in reference to the proper construction and application of paragraph Six of Item Four of the said will of R. J. Reynolds, and that thereupon an action was instituted in the Superior Court of Forsyth County by R. J. Reynolds (Jr.) against the Safe Deposit & Trust Company of Baltimore, Trustee * * *; that a judgment was entered in said action, which, upon appeal, was affirmed by the Supreme Court of North

There further coming on to be heard in this cause the intervening complaint of the State of North Carolina, setting forth its claim for inheritance and estate taxes; and the court, upon presentation of said complaint, having read and considered the will of R. J. Reynolds and the will and deed of Katherine S. Johnston for the purpose of determining the nature, character, and extent of whatever interest, or interests, said wills and deed conferred upon Zachary Smith Reynolds, in the trusts thereby established, hereby finds and concludes as follows:

(a) *The will of R. J. Reynolds did not bequeath or devise* to Zachary Smith Reynolds *any vested interest or share in the trust estate* (*or any part thereof*) *created and established by said will.* A proper construction and interpretation of said will shows that *no part of the trust estate* established thereby, and none of the accumulated income thereof, *would have vested* in the said Zachary Smith Reynolds *unless and until he arrived* at the age of twenty-eight years. Until the said Zachary Smith Reynolds arrived at said age of twenty-eight years, *the only interest which he had in the trust estate* established by said will (*or any part thereof*) was to receive such payment from the income thereof, if, as, and when payable to him, under the terms of said will. *Consequently, upon the death* of the said Zachary Smith Reynolds, prior to reaching the age of twenty-one years, *no part of*

Carolina, * * * [201 N. C. 267] * * * and that said judgment has ever since been complied with in the administration of said trust.

That one of the issues raised in said case * * * was the following:

2. Whether if the contention of the trustee is correct, the plaintiff is not entitled to include in his annual statement income received from his share of the trust estates of his father * * * *as "earnings* of money, *stocks or bonds owned by him."*

That * * * in said cause * * * *the argument was squarely presented to the Court, that the children of R. J. Reynolds owned vested interests in his estate with a period of postponed possession* until they should respectively attain the age of 28 years, *subject only to be divested by death* before arriving at that age, *which argument was considered by the court and expressly rejected* as appears in its opinion heretofore referred to. * * * Therefore, the Court holds as a matter of law that the *children of R. J. Reynolds did not receive any vested interest* in the trust estates of * * * their father * * *; that by the will of their father *they had only* the right to receive, if, as and when payable, certain income from said estate, *and the possibility of receiving* property *vested both in interest and possession if, as, and when they should respectively attain the age of 28 years;* * * * (Italics supplied.)

> *said trust estate (either corpus or income) was transferred from him to any one.* (Exhibit A, pp. 680–681; Exhibit B, p. 737.)

The said judgment was appealed to the Supreme Court of North Carolina. The record in the Supreme Court consisted of the volume comprising "Exhibit A" herein, and the volume comprising "Exhibit B" herein.[1]

The appeal was fully argued before the Supreme Court, which approved and affirmed the judgment of the Superior Court. The findings, opinion and decision of the Supreme Court are likewise set out in full in "Exhibit B" herein, at pp. 711–792.

In its report the Supreme Court recited *in haec verba* the judgment of the Superior Court,[2] including the judgment of that Court relative to the nature and extent of the trust beneficiaries' interest in the trust corpus.[3]

In affirming the judgment of the Superior Court, the Supreme Court said:[4]

> The record discloses that the court below found that all parties in interest, whether *in esse* or *in posse*, present and prospective, were made parties and before the court. Those of age and minors representing every vested or contingent interest and every class—The State of North Carolina claiming its inheritance or succession taxes. All were made parties and by interplea became parties and filed fully their contentions. *This case was tried in the court below, as this Court, when it was here, in its opinion said it should be tried. The court below had full power and authority to hear and determine the contentions.* (Italics supplied.)

Again the Supreme Court said:[5]

> The pleadings have been enlarged to embrace all the

---

[1] The entire record, in all of the proceedings referred to herein, is contained in said Exhibits A and B.

[2] See "Exhibit B" herein, pp. 712–751.

[3] See paragraph 60 (a), "Exhibit B," p. 737.

[4] *Reynolds* v. *Reynolds*, 208 N. C. 578, at p. 612; "Exhibit B," p. 760.

[5] "Exhibit B," p. 768.

controversies connected with the distribution of said trust shares; and *all parties having any present, future, or contingent interests therein* have been made parties to the action. (Italics supplied.)

Again the Supreme Court said:[1]

> In the present case new facts are set forth, the pleadings are enlarged *to bring in all parties* that have the remotest interest and sufficient allegations to cover *every conceivable controversy,* and the *differences are vital and bona fide controversies.* (Italics supplied.)

Again the Supreme Court said:[2]

> Paragraph 25 of the judgment is as follows: "That the parties to this proceeding are all properly before the Court; that either a next friend or a guardian ad litem has been duly appointed for each and every infant, whether born or unborn, who is now, or may hereafter be, in any way interested in the trust shares hereinafter mentioned; that all persons, whether minors or of age, and whether in esse or in posse, who are now, or who may hereafter be, interested in the trust shares hereinafter mentioned, have been made parties to this action, and have either appeared herein, or been duly served with process herein and with copies of all the foregoing pleadings."

Again the Supreme Court said:[3]

> All the facts are fully, elaborately and carefully set out in the record and the judgment which we set forth above, covering every aspect of the controversy. Due care has been taken in so important a controversy, where the property rights of infants are concerned, to set forth all the facts in the case. *We think there was sufficient evidence to support the findings of fact in the Court below on the different aspects of the controversy.* (Italics supplied.)

The decisions of the Courts of North Carolina firmly establish that *petitioner did not acquire any vested property at the date of his father's death;* that unless and until he arrived at the age of 28 years "*no part of the trust estate would have vested in him.*"

---

[1] "Exhibit B," p. 772.

[2] *Ibid*, p. 773.

[3] *Ibid*, p, 790.

The law of the State of North Carolina, as evidenced by those decisions of its Courts, was determinative and binding upon the court below and upon this Court. *Blair* v. *Com'r*, 300 U. S. 5; *Freuler* v. *Helvering*, 291 U. S. 35; *Poe* v. *Seaborn*, 282 U. S. 101, 110; *Uterhart* v. *United States*, 240 U. S. 598, 603.

The court below properly followed the law of North Carolina as declared by its courts, and after discussing the matter in extenso (R. 45–47, fol. 70–72), held that the precise point had been definitely decided by the North Carolina courts and that the interest of respondent was contingent and not vested.

On that predicate the court below held, in effect, that since respondent had only a contingency or possibility of acquiring, and not an acquired vested interest, he did not "acquire" the corpus of the trust at the date of his father's death, but acquired it when he "became entitled" to it on the day he attained the age of 28 years.

Upon all of the foregoing it is obvious that there is no conflict between the Circuit Courts below on the point as to whether the interests of the respective taxpayers were vested or contingent. The decision below, in the instant case, is predicated on the finding that, under North Carolina law, respondent had only a contingent, and not a vested, interest at the date of testator's death. The decision below is grounded on that thesis. Obviously the decisions in *Van Vranken* and *Archbold* proceed upon the same thesis and conclude that in effect the resolution of that question can not affect the result.

Respondent submits that the resolution of a question of North Carolina law is not one of general interest; that the decisions of the courts of North Carolina interpreting the will of R. J. Reynolds and defining the property rights of the parties thereunder is conclusive; and that the decisions on that point do not present an issue properly reviewable by this Court.

CONCLUSION.

For the above reasons respondent respectfully submits that, if the writ be granted, it should be restricted to the precise issue raised by the alleged conflict below. Accordingly, respondent prays the Court that, if the writ be granted, the issue therein be limited to the federal question involved, viz., the construction of sec. 113 (a) (5) of the Revenue Act of 1934.

J. GILMER KÖRNER, JR.,
404 Transportation Building,
Washington, D. C.
Attorney for Respondent.

H. G. HUDSON,
STRATTON COYNER,
Of Counsel.

January, 1941.

BLANK PAGE

24

FILE COPY

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 684.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

RICHARD J. REYNOLDS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT ON THE WRIT AND IN OPPOSITION TO PETITIONER'S MOTION TO REVERSE.

J. GILMER KÖRNER, JR.,
404 Transportation Building,
Washington, D. C.,
Attorney for Respondent.

H. G. HUDSON,
STRATTON COYNER,
Of Counsel,
Winston Salem, N. C.

April, 1941.

BLANK PAGE

INDEX.

Opinions Below 1
Questions Presented 1
Statute and Regulations 2
Statement 2
Summary of Argument 5
Argument 6
1. Legislative History 7
Legislative History of Sec. 113 (a) (5) 7
Legislative History of 1928 Act 7
Rule of *Brewster* v. *Gage* 11
Uniform Rulings & Decisions on Vested and Contingent Interests 12
Treasury Rulings G. C. M. 10260 and O. D. 727.... 12, 13, 38
Legislative History of 1934 Act 18
Hearings in Committee 20
Proper Construction of Sec. 113 (a) (5) of 1934 Act 21
Supreme Court Definition of Word "Acquired" ..24–25
2. The State Law is Binding as the Rule of Property 28
North Carolina Decisions Define Respondent's Interest 29
Summary of North Carolina Rule in this Case 31
3. Regulation Cannot Alter or Amend the Law 34
Congress Continued Construction Doctrine Applicable 35
Regulations 86 Do Not Apply to this Case 38
Regulations 86 Should Not Be Applied Retroactively 39
4. Respondent's Answer to Points Made by Petitioner 40
Petitioner's Argument is Legislative and not Judicial 40
Paramount Rules of Construction 41
Decisions in *Maguire*, *Gambrill* and *Campbell* not Controlling 44

Maguire case 47
Gambrill case 48
Campbell case 49
Brewster v. *Gage* 48
5. Securities Purchased by Trustee not then Acquired by Respondent 51
Maguire, Gambrill & Campbell distinguished 52
Art. 113 (a) (5)-1 (d) of Reg. 86 is not Controlling 53
Respondent Acquired all of the Securities by Bequest, Devise or Inheritance 56
6. Petitioner's Motion to Reverse 59
7. Conclusion 59

APPENDIX:

Index to Appendix, following page 59

CITATIONS.

Cases:

Alabama Great Southern R. Co., U. S. *v.*, 142 U. S. 615 36
Archbold, Richard, 40 B. T. A. 1238 4
Augustus, Elizabeth G., 40 B. T. A. 1201 4
Becker *v.* Anchor Realty & Inv. Co., 3 F. S. 22 13
Beers *v.* Commissioner, 78 F. (2d) 447 ..... 14, 17
Blair *v.* Commissioner, 300 U. S. 5 28
Blatt *v.* U. S., 305 U. S. 267 38
Bliss, Helvering *v.*, 293 U. S. 144 ..... 36, 37
Brewster *v.* Gage, 280 U. S. 327 ..... 11, 26, 34, 45
Campbell *v.* Com'r, —— U. S. —— 6, 45, 49, 50
Case *v.* Los Angeles Lbr. Co., 308 U. S. 106 14
Cerecedo Hermanos y Comp., U. S. *v.*, 209 U. S. 337 35
Chandler *v.* Field, 63 F. (2d) 13 14
City Bank Farmers Trust, Helvering *v.*, 296 U. S. 85 27
Copper Queen Con. Min. Co. *v.* Arizona, 206 U. S. 474 35
Crooks *v.* Harrelson, 282 U. S. 55 43
Deputy *v.* DuPont, 308 U. S. 488 25
Dobbin *v.* Com'r. 31 F. (2d) 935, 72 F. (2d) 984 56

Electric Storage Battery Co. v. Shimadzu, 307 U. S. 5 .. 14
Erie R. Co. v. Tompkins, 304 U. S. 64 29
Farrar, U. S. v., 281 U. S. 624 36
Fawcus Machine Co. v. U. S., 282 U. S. 375 36
Fletcher, Com'r. v., 59 F. (2d) 508 57
Forbes v. Commissioner, 82 F. (2d) 204 14
Freuler v. Helvering, 291 U. S. 35 28
Gambrill v. Com'r, —— U. S. —— 6, 45, 48
Goldenberg, U. S. v., 168 U. S. 95 43
Gould v. Gould, 245 U. S. 151 42
Gowran, Helvering v., 302 U. S. 238 38
Griscom v. Commissioner, 22 B. T. A. 979 14
Hartley v. Commissioner, 295 U. S. 216 11
Hecht v. Malley, 265 U. S. 144 14
Heiner v. Donnan, 285 U. S. 312 37
Hopkins v. Commissioner, 69 F. (2d) 11 .... 14, 15
Hubbell v. Helvering, 70 F. (2d) 668 28
Jackson, U. S. v., 280 U. S. 183 36
Kalb v. Commissioner, 15 B. T. A. 886 13
Kayser v. Commissioner, 27 B. T. A. 816 14
Kimberly, Helvering v., 97 F. (2d) 433 38
Koshland v. Helvering, 298 U. S. 441 .... 36, 38
Lane v. Corwin, 63 F. (2d) 767 .... 13, 16
Latimer v. U. S., 223 U. S. 501 14
Lyeth v. Hoey, 305 U. S. 188 57
McCaughn v. Hershey Chocolate Co., 283 U. S. 488 35
McKinney v. U. S., 62 C. Cls. 180 .... 8, 11
Maguire v. Com'r., —— U. S. —— 6, 45, 54, 58
Manhattan General Equipment Co., 297 U. S. 129 37
Massachusetts Mutual L. Co. v. U. S., 288 U. S. 269 36
Merriam, U. S. v., 263 U. S. 179 41
Molter v. Commissioner, 69 F. (2d) 7 14
Morris-Poston Coal Co. v. Com'r, 42 F. (2d) 620 37
Murphy Oil Co. v. Burnet, 287 U. S. 299 36
National Lead Co. v. U. S., 252 U. S. 140 36
O'Donnell, 35 B. T. A. 251 43
Old Colony R. Co. v. Com'r, 284 U. S. 552 .... 25, 36, 42

Old Mission Cement Co. *v.* Com'r, 293 U. S. 289 36
Partington *v.* Atty. Gen., L. R. 4, H. L. 100 42
Poe *v.* Seaborn, 282 U. S. 101 28
Pringle *v.* Commissioner, 64 F. (2d) 863 .... 13, 15
Reynolds *v.* Reynolds, 208 N. C. 578 .... 6, 29, 30, 31
Reynolds, R. J. Tob. Co., Com'r *v.*, 306 U. S. 110 .... 36, 38, 39
Roebling *v.* Commissioner, 78 F. (2d) 444 17
Rovensky, 37 B. T. A. 702 37
San Joaquin Fruit & Inv. Co., Helvering *v.*, 297 U. S. 496 .... 24, 26
Schlesinger *v.* Wisconsin, 270 U. S. 230 37
Sharp *v.* Commissioner, 303 U. S. 624 29
Shattuck, Com'r *v.*, 97 F. (2d) 790 38
Smith *v.* City of Providence, 9 Atl. (2d) 10 57
Spindle *v.* Shreve, 111 U. S. 542 28
Squibb, E. R. & Sons *v.* Commissioner, 98 F. (2d) 69 36
Taplin *v.* Commissioner, 41 F. (2d) 454 37
Twining *v.* Commissioner, 83 F. (2d) 954 .... 13, 14, 16
Universal Battery Co. *v.* U. S., 281 U. S. 580 36
Uterhart *v.* U. S., 240 U. S. 598 28
Van Vorst, Commissioner *v.*, 59 F. (2d) 677 37
Walker *v.* U. S., 83 F. (2d) 103 54
Warner *v.* Commissioner, 72 F. (2d) 225 .... 13, 14, 16
Winmill, Commissioner *v.*, 305 U. S. 79 35
Wood, Helvering *v.*, 309 U. S. 344 .... 27, 28
Woolworth Co. *v.* U. S., 91 F. (2d) 973 38
Wright *v.* Commissioner, 29 B. T. A. 1033 14

Statutes and Regulations:

Revenue Act of 1918, 202 (a) 7, 10
Revenue Act of 1921, 202 (a) (3) 7, 10
Revenue Act of 1924, 204 (a) (5) 7, 10
Revenue Act of 1926, 204 (a) (5) 7, 10
Revenue Act of 1928, 113 (a) (5) 7, 10, 46
Revenue Act of 1932, 113 (a) (5) 46
Revenue Act of 1934, 113 (a) (5) 7, 11, 52
Revenue Act of 1934, 22 (b) (3) 57, 58

Regulations 62, Art. 1563 58
Reg. 86 (1935) 39, 53, 54

Departmental Rulings:
G. C. M. 10260, C. B. XI-1, 79 .... 13, 38
App. 7-12
O. D. 727, 3 C. B. 53 .... 7, 12

Miscellaneous:
Report of Joint Committee on Internal Revenue Taxation (House Document #139, 70th Cong., 1st Sess.) 8
App. 3
Ways and Means Subcommittee Report (1934) 18
Statement of Acting Secretary of the Treasury 19
Report of Ways and Means Committee (House Rep. #2, 70th Cong., 1st Sess.) .... 9, App. 4
Report of Senate Finance Committee (Senate Rep. #960 70th Cong., 1st Sess.) .... 9, App. 4
Conference Report (House Rep. #1882, 70th Cong., 1st Sess.) .... 10, App. 5
Hearings before Ways and Means Committee 20
Magill's "Taxable Income" 23
Bouvier's Law Dictionary 6, 24, 56
New Century Dictionary 24
Webster's Dictionary 24

BLANK PAGE

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 684.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

RICHARD J. REYNOLDS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT ON THE WRIT AND IN OPPOSITION TO PETITIONER'S MOTION TO REVERSE.

OPINIONS BELOW.

The opinion of the Board (R. 28) is reported in 41 B. T. A. 59. The opinion of the Circuit Court of Appeals (R. 41) is reported in 114 F. (2d) 804.

QUESTIONS PRESENTED.

On April 4, 1934, respondent became entitled to certain securities and on that day he obtained them as his own. Prior to that date they did not belong to him and he had no interest in the said securities. On the day on which he became entitled to the securities he received them from the Trustee of a testamentary trust established by the will of his father who died in 1918.

Some of the securities acquired by respondent on April 4, 1934, were securities which had been owned by his father at the time of his death. Others were purchased by the Trustee between 1918 and 1934.

The question is whether respondent "acquired" the securities when he became entitled to them, when they became his, and when he received them on April 4, 1934, or whether he "acquired" them partly when his father died in 1918, and partly as the Trustee purchased them from time to time between 1918 and 1934.

STATUTE AND REGULATIONS INVOLVED.

The statute and regulations involved are set out in the Appendix, *infra*, pp. 1–2.

STATEMENT.

This case was submitted on a stipulation which is found at R. 24. The stipulation included two exhibits (Exhibits A and B). The pertinent provisions of the will of R. J. Reynolds (including Items "Fourth" and "Eighth") appear at R. 16–21.

R. J. Reynolds died testate on July 19, 1918, a resident of North Carolina. In his will he created a trust for the benefit of his four children. Respondent was the oldest of the four children and was 12 years of age when his father died. The trust provided that the trustee should apply so much of the trust *income* as was necessary for the support, maintenance and education of each child until such child became 21 years of age; to pay each child an annual *income* of not less than $5,000 from the date such child became 21, and until he attained the age of 28; to accumulate the balance of the trust income for the respective use of each child "until he or she shall respectively attain the age of twenty-eight (28) years, *when each of them shall become entitled to* and shall respectively receive from said Trustee his or her share of the corpus."

The will further provided that: "Should any of my children

die before he or she shall arrive at the age of twenty-eight (28) years, *then* the share of my estate *which would have been* payable to him or her, *had he or she arrived at that age*, shall be continued to be held by my said Trustee" for the benefit of a devisee of such child until the date when such child would have reached 28 (if he had lived that long), at which time the trust should terminate and be payable to such devisee.

The will also provided that in the event such child did not live to the age of 28, and died intestate, leaving issue, the Trustee should continue the trust for the benefit of such *issue* until the date such *child* would have reached 28 (if he had lived that long), at which time "the trust shall cease and the estate shall become vested" in such issue as may be living at that date. In the event all four children died intestate, and without issue, before reaching 28, the estate was to vest in the wife, brothers and sisters *of the testator*.

Respondent attained the age of 28 on April 4, 1934. On that date the Trustee transferred to him certain stocks and other securities representing his share of the trust corpus. The stock so delivered was stock which the Trustee had received from the estate of the testator. The other securities were securities which the Trustee had purchased at various times between 1918 and 1934.

Later in 1934 respondent sold some of the said stock and securities. In computing his gains and losses, respondent used as his basis the value of the property on April 4, 1934. The Commissioner recomputed the gains and losses by using, as the basis, the value of the stock at the date of the death of R. J. Reynolds in 1918, and the cost of the other securities to the Trustee when it purchased them.

The Courts of North Carolina (including the Supreme Court) have interpreted the instant will and trust and have determined the nature and extent of respondent's rights thereunder. The North Carolina Courts decided and held that unless and until he arrived at the age of 28 the only right he had under his father's will was to receive certain amounts of *income* if, as and when such *income* became payable to him; that no part of

the trust property would have vested in respondent unless and until he had arrived at the age of 28; that the will of respondent's father did not bequeath or devise to respondent any vested interest or share in the trust estate or any part thereof; that prior to the age of 28 the respondent did not own an interest in the trust property with possession thereof postponed until he should reach the age of 28; that during that period respondent did not own an interest which was subject to divestment by death before the age of 28; and that during that period respondent had only the possibility of receiving property in interest and in possession if, as, and when he should attain the age of 28.

Respondent contended below, and still contends, that prior to April 4, 1934, he did not become entitled to the property and hence did not own it; that he could not "acquire" the property before he became entitled to it and had the ownership of an interest in it; and that he could not have acquired it before April 4, 1934. The Commissioner contended that regardless of the foregoing the respondent nevertheless acquired the property prior to April 4, 1934.

The Board sustained the Commissioner upon the authority of *Augustus*, 40 B. T. A. 1201, and *Archbold*, 40 B. T. A. 1238. In the *Augustus* case five members dissented with an opinion. In the *Archbold* case six members dissented with an opinion. We respectfully invite this Court's attention to those dissents.

The Circuit Court of Appeals reversed the Board.

* * * * *

At page 5 of his brief, in his specifications of error, petitioner states that the Court below held that the basic value of the securities was their value on the date of "distribution." It is respectfully submitted that the Court below held no such thing. The Court below held that the basic value was the value on the date when respondent "acquired" the securities. The decision below was in no wise concerned with the time of "distribution," nor did the decision below in any way turn upon the issue of distribution. The Supreme Court has recently decided certain cases arising under a different statute in which the date of

"distribution" was the basic date. Respondent herein respectfully prays the Court not to be confused by the possibly inadvertent statement contained twice in petitioner's specification of errors.

SUMMARY OF ARGUMENT.

1. The 1934 Act (reenacting the provisions of the Acts of 1921, 1924 and 1926) provides that the property *which is acquired* shall take as its basis the fair market value *"at the time of such acquisition."*

2. Both prior and subsequent to the enactment of the 1934 Act many decisions of the Supreme Court, Circuit Courts, the Board, and the Department, had construed "time of acquisition" to mean the date on which the taxpayer obtained the property as his own and became the owner of a substantial property right in the trust corpus.

3. The Courts of North Carolina have construed the instant will and held that it did not bequeath or devise to respondent any share of the trust corpus; that respondent's only right under the will was to receive certain *income* if, as, and when payable to him; that prior to reaching age 28, respondent did not have an interest which was merely postponed as to time of possession; that prior to reaching age 28, respondent did not have an interest which was subject to defeasance or divestment by death before reaching 28 years; and that prior to age 28, respondent had only the expectancy or possibility of receiving an interest in, and possession of, certain trust property. 208 N. C. 578.

4. The rule of property laid down by the Supreme Court of North Carolina is binding upon the courts and is dispositive of the issue here.

5. Neither Congress by legislation, nor the Treasury Department by regulation, can make that to be a fact which is not a fact, nor can the Treasury Department by regulation construe an Act contrary to its plain intendment.

6. The reenactment of sec. 113 (a) (5) of the 1934 Act in the

same language as that contained in the corresponding sections of the Revenue Acts of 1926, 1924 and 1921, constituted an approval of the interpretation put upon that language by the Courts and the Department, and such construction has the force and effect of law.

7. The recent decisions of this Court in *Maguire*, No. 346, *Gambrill*, No. 472, *Campbell*, Nos. 473–475, are not controlling here. The point decided in those cases (under a different statute) was that "distribution to the taxpayer" meant either distribution to him personally or to someone who represented him in such capacity as to enable him to receive a distribution for him. Those decisions proceed upon the theory that the taxpayer had the property rights in the trust corpus and, therefore, being the owner he could receive distribution thereof either *in propria personam* or by and through his agent. The instant case goes to ownership itself. In the absence of ownership, distribution can not control. Therefore, a decision based upon distribution is not decisive of a case where the criterion is acquisition of the ownership of the property.

ARGUMENT.

The will of R. J. Reynolds clearly provides that, until the age of 28, petitioner should have no right except to receive a specifically limited amount of income; that in the event petitioner died before attaining 28 years the property should belong to others; that only in the event petitioner attained the age of 28 would he become entitled [1] to the corpus and only at that age would the corpus belong to him.

The Supreme Court of North Carolina has construed the said will and has held that he did not and could not take any interest in the trust estate unless and until he reached age 28.[2]

The 1934 Act says that: "If the property was acquired by

[1] The ordinary, natural, popular, and received import and sense of the word "entitled" is shown by *Bouvier's Law Dictionary* thus: "Entitle. In its usual sense, to entitle is to give a right; therefore a person is said to be entitled to property when he has a right to it."

[2] *Reynolds* v. *Reynolds*, 208 N. C. 578, 597, discussed *infra*.

bequest, devise, or inheritance * * * the basis shall be the fair market value of *such property* at the time of *such acquisition.*"

The majority of the Board waved aside the plain language of the statute and held that the "time of such acquisition" means the date of decedent's death regardless of whether the taxpayer obtained any ownership or not. The Board bases this conclusion on an uncritical and obviously casual reading of a portion of a Committee Report of the Ways and Means Committee accompanying the 1934 Bill, which is quoted in the Board's opinion in the *Augustus* case, 40 B. T. A. 1201, at 1207.

When language is considered out of its context such error often arises. When the said Committee Report is considered in the light of its history, and in connection with the legislative and judicial history of the statutory provision, it will be seen that the quoted report does not support the Board's conclusion but negatives it. The Circuit Court so considered it, and reversed the Board.

Legislative History of Sec. 113 (a) (5).[1]

The provisions of sec. 113 (a) (5) of the 1934 Act were not novel. They had had a long history in prior acts. Sec. 113 (a) (5) is identical with the language which appeared as §202 (a) (3) of the 1921 Act, §204 (a) (5) of the 1924 Act, and §204 (a) (5) of the 1926 Act. These sections are set out in the *Appendix, infra*, p. 1. In the 1928 and 1932 Acts, however, this paragraph appeared in a wholly different form. A history of how this change came about, and of how the section was restored to its original form, is necessary for a clear understanding of the subject-matter.

During the period the Revenue Acts of 1918, 1921, 1924 and 1926 were in force, the sections in those Acts which were the same as sec. 113 (a) (5) of the 1934 Act, were construed by the Department. As early as 1920 the Department held in *O. D.* 727, 3 C. B. 53, that:

[1] Orville Smith and Erwin N. Griswold, Esqrs., collaborated in this portion of the brief.

> Where in a bequest of property the remaindermen have only a contingent interest prior to the death of the life tenant, the basis for determining gain or loss from a sale of such property by the remaindermen is its value as of the date of death *of the life tenant.*

The 1928 Act.

When the Revenue Act of 1928 was being formulated the Joint Committee on Internal Revenue Taxation made a Report, pursuant to the duty imposed on it by §1203 (c) (5) of the Revenue Act of 1926. This Report (House Document No. 139, 70th Congress, 1st Session, pp. 17–18; the relevant paragraphs of which are set out in the *Appendix, infra*, p. 3, contained a passage under a bold-faced heading: "*Basis for Gain or Loss on Sales by an Executor.*" The chief matter discussed was the then recent decision of the Court of Claims in *McKinney* v. *United States*, 62 C. Cls. 180 (1926), certiorari denied, 273 U. S. 716 (1926) where it had been held that gain or loss on a sale by an *executor* should be determined on the basis of the cost of the property to the decedent. This rule, the Joint Committee said, "is inconvenient." The old rule, that gain or loss on an *executor's* sale is measured by the value at the decedent's death, "seems preferable, and it is recommended that it be set forth in the statute." Immediately following this discussion, and under the same heading, the following paragraph was added:

> Section 204 (a) (5) [referring to the 1926 Act] prescribes the basis when the beneficiary sells the property as the value at the time of "acquisition." Some doubt has arisen as to what is meant by the date of acquisition. The "date of death" is recommended to make the basis certain and definite.

In accordance with this recommendation, the Revenue Bill of 1928, when it was introduced into the House, put §113 (a) (5) into the following form:

> If the property was acquired by bequest, devise, or

inheritance, or by a decedent's estate from the decedent, the basis shall be the fair market value of such property *at the time of the death of the decedent.* (Italics supplied.)

The Report of the Ways and Means Committee accompanying this Bill (House Report No. 2, 70th Congress, 1st Session, p. 18) explained the change in these words:

> SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS—EXECUTOR'S SALE.
>
> In view of the decision of the Court of Claims in McKinney v. United States, it is desirable specifically to provide what basis shall be used in determining gain or loss on the sale of property by an estate. It is believed that the basis should be the value of the property on the date of the decedent's death, and this rule is incorporated in section 113 (a) (5).
>
> It is also provided, in the same paragraph, that the basis in case of a sale by a beneficiary shall be the value of the property on the date of the decedent's death.
>
> Under existing law, the basis in such a case is the value at the date of "acquisition," which is indefinite and has given rise to controversy. The value on the date of death affords an equitable and more readily determinable basis.

If the statute had been enacted in the form in which it appeared in the House Bill, and if it had continued in this form in the later Acts, it would clearly have led to the result reached by the Board below. Congress thus showed that it knew how to write statutory language which would require the conclusion that the Board has adopted in this case. *But Congress did not enact this language, and never has enacted it, or anything like it.* Instead, when the Bill went to the Senate, §113 (a) (5) was put into wholly different form. In the Bill, as reported to the Senate by the Senate Finance Committee, §113 (a) (5) was made to read as follows:

> If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise

> or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer.

The Report of the Senate Committee contains a long discussion of this change. Senate Report No. 960, 70th Congress, 1st Session, p. 26. This is set out in full in the *Appendix, infra*, pp. 4–5. Among other things, the Senate Committee said: "It appears that the House Bill is inadequate to take care of a number of situations which frequently arise." It pointed out that the value at the date of death *could not* be used in the case of property *purchased by the executor*, or "in the case of property transferred in contemplation of death where the donee sells the property while the donor is living." For these reasons, the Senate Committee proposed the much more detailed provision which it substituted for the section adopted by the House.

The provision recommended by the Senate Committee was adopted by the Senate. When the Bill went to Conference, the House receded. The Conference Report contains simply a restatement of the language in the Report of the Senate Committee. See House Report No. 1882, 70th Congress, 1st Session, p. 14 (Amendment No. 75) set out in the *Appendix, infra*, pp. 5–6. Thus the change in the law proposed by the Senate passed into the statute. It was enacted again in the same form in §113 (a) (5) of the Revenue Act of 1932.[1] Thus, the situation was that from 1921 to 1928 the statute contained a provision identical with that which is now before the court, while from 1928 to 1934, wholly different language was used in §113 (a) (5). *In making the change, however, Congress expressly*

[1] There was no discussion of this section in the Committee Reports on the 1932 Act.

rejected a form of the statute which would have made the date of death of the decedent the basic date in all cases.

In the Revenue Act of 1934, 113 (a) (5) was restored to its original, or pre-1928, form. The circumstances existing at the time of this change, and the details of the legislative history are obviously of great importance in determining the proper meaning to be given to the restored language. These facts will be detailed below. In this connection, it should be recalled that the change made in 1928 was due, in large part, as the legislative history clearly shows, to the decision of the Court of Claims in *McKinney* v. *United States.*[1] *No specific reference was made then, or at any time, to the question of contingent bequests.*

The Rule of Brewster v. Gage.

Two years after the enactment of the Revenue Act of 1928, the Supreme Court decided the case of *Brewster* v. *Gage*, 280 U. S. 327 (1930). That case arose under the Revenue Acts of 1918 and 1921. The Revenue Act of 1921 contained a provision identical with those involved in this case, and the Revenue Act of 1918 was held to have the same effect. In *Brewster* v. *Gage*, the legatee took *an outright unqualified vested interest.* The question arose only because the legatee's actual receipt of the property in his possession was subject to the delay made necessary by the administration of the estate; but the beneficiary's right was subject to no contingency or condition. *The Court made this the basis of its decision* that the legatee took as his basis the value of the property at the decedent's death, saying (p. 334): "Petitioner's right later to have his share of the residue *vested immediately upon testator's death.* At that time petitioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property." (Italics supplied.)

That decision obviously related only to a vested interest and

[1] The *McKinney* case was finally disapproved in *Hartley* v. *Commissioner*, 295 U. S. 216 (1935), where it was held, under the 1924 and 1926 Acts, that the basis on a sale by *the executor* was the value at the date of the decedent's death.

to one which was entirely unqualified, because that was the only sort of interest which was before the Court. No conditions or contingencies were there involved. *That case decided only one thing, viz: that where testator's death vests property immediately in the remainderman, such remainderman "acquires" the property at the moment of such vesting*—irrespective of the fact that he does not secure possession until later. That case did NOT hold that a *contingent* right in property, or a property right which was *not vested*, was one which was "acquired" at testator's death.

The Board's opinion herein states that the reasoning of *Brewster* v. *Gage* indicates that the purpose of the section was to make decedent's death the basic date regardless of the nature of the interest received. It is futile to argue what is palpably not so. *Brewster* v. *Gage* supports no such conclusion, and the Board is in error in stating that it does. On the contrary, *Brewster* v. *Gage* directly and positively negatives the Board's conclusion in the instant case. See dissenting opinions in *Augustus* and *Archbold* cases, *infra*, *Appendix*, pp. 13–15.

Uniform Decisions and Rulings on Vested and Contingent Interests.

When the Revenue Act of 1934 was under consideration, the Bureau of Internal Revenue had for fourteen years recognized the distinction between vested and contingent legacies in construing the word "acquired." *O. D.* 727, 3 C. B. 53, was published in 1920. It reads as follows:

> Where in a bequest of property the remaindermen have only a contingent interest prior to the death of the life tenant, the basis for determining gain or loss from a sale of such property by the remaindermen is its value as of the date of death of the life tenant.

Twelve years later, in 1932, the General Counsel of the Bureau of Internal Revenue considered the same question in an

exhaustive opinion,[1] and reached the same result. In *G. C. M.* 10260, C.B. XI-1, 79, 80, he said:

> * * * the position of this office has been that one who has a mere contingent interest does not "acquire" the property in question until his interest becomes vested. (O. D. 727, C. B. 3, 53; S. M. 4640, C. B. V-1, 60.) See also I. T. 1622, C. B. II-1, 135; S. O. 35, C. B. 3, 50.)

This was *after* the decision in *Brewster* v. *Gage*, which was specifically considered in the G. C. M. 10260, and which the Bureau obviously did not regard as establishing the construction of the word "acquired" so far as contingent interests were concerned. The practice was thus clear, consistent, and express at the time the Revenue Act of 1934 was enacted.

This same result had also been *uniformly* reached by the Board and the courts *at the time the Revenue Act of 1934 was under consideration.* In a number of cases it was held that a beneficiary did not "acquire" property when his interest was merely contingent. *Lane* v. *Corwin*, 63 F. (2d) 767 (C. C. A. 2, 1933), *cert. den.* 290 U. S. 644 (1933)—1928 Act,[2] *Pringle* v. *Commissioner*, 64 F. (2d) 863 (C. C. A. 9, 1933), *cert. den.* 290 U.S. 656 (1933)—1921 Act; *Becker* v. *Anchor Realty and Investment Co.*, 3 F. S. 22 (E. D. Mo. 1933) *aff'd*, 71 F. (2d) 355 (C. C. A. 8, 1934)—1928 Act; *Kalb* v. *Commissioner*, 15 B. T. A. 886 (1929)—1921 Act. The same rule was recognized in other cases decided before the enactment of the Revenue Act of 1934,

---

[1] G. C. M. 10260 contains an exhaustive treatment of the whole subject matter, including the intent of Congress as evidenced by the Legislative History. It is too long for complete quotation but the salient portions are set forth *infra* in the *Appendix*, pp. 7-12.

[2] Cases decided under the 1928 Act are relevant in considering this question. Under that Act, as under the earlier Acts, the essential question was the proper meaning of the word "acquired." See *Twining* v. *Commissioner*, 83 F. (2d) 954 (C. C. A. 2, 1936), *cert den.*, 299 U. S. 578 (1936), involving the 1928 Act, where the court, in speaking of *Warner* v. *Commissioner*, 72 F. (2d) 225 (C. C. A. 2, 1934) *cert. den.*, 293 U. S. 620 (1934) said: "It is true that the Revenue Act there under consideration was the 1926 Act, but the problem of what was meant by the word "acquired" was no different from what it is under the 1928 Act."

where, however, the remainder was found to be vested. *Chandler* v. *Field*, 63 F. (2d) 13 (C. C. A. 1, 1933), *cert. den.*, 289 U. S. 758 (1933)—1926 Act; *Molter* v. *Commissioner*, 69 F. (2d) 7 (C. C. A. 7, Jan. 22, 1934)—1924 and 1926 Acts; *Hopkins* v. *Commissioner*, 69 F. (2d) 11 (C. C. A. 7, Jan. 26, 1934)—1924 and 1926 Acts; *Griscom* v. *Commissioner*, 22 B. T. A. 979 (1931)—1924 Act; *Kayser* v. *Commissioner*, 27 B. T. A. 816 (1933)—1924 Act; *Wright* v. *Commissioner*, 29 B. T. A. 1033 (Feb. 7, 1934)—1926 Act.[1]

There was thus written on the books for all to see a well-settled construction of the meaning of the word "acquired," when Congress was considering the Revenue Act of 1934. *It does not matter whether that construction was right or wrong. The important fact is that it existed and was uniform.* When Congress put back into the Revenue Act of 1934 the language of the earlier acts which had been given uniform meaning by the Bureau, the Board and the Courts, it must be deemed to have approved and adopted this construction. If it did not accept the meaning which the Bureau, the Board, and the Courts had repeatedly put on the words used, it would certainly have expressed the meaning it did intend. Instead, it used the very words which had been in the earlier statutes, and which had been recently and uniformly construed. There is thus clear occasion for the application of the well-settled and sound rule that when Congress puts into a statute words which have received a judicial construction, it must be presumed to have used the language in the sense which had previously been given to it. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115 (1939); *Hecht* v. *Malley*, 265 U. S. 144, 153 (1924); *Latimer* v. *United States*, 223 U. S. 501, 504 (1912).[2] See also *Electric Battery Co.* v. *Shimadzu*, 307 U. S. 5, 14 (1939).

The clarity and the uniformity of this construction may be

---

[1] The same construction has been uniformly followed in the decisions made after the enactment of the Revenue Act of 1934. See *Warner* v. *Commissioner*, 72 F. (2d) 225 (C. C. A. 2), July 23, 1934), *cert. den.* 293 U. S. 620 (1934)— 1926 Act; *Beers* v. *Commissioner*, 78 F. (2d) 447 (C. C. A. 3, 1935), *cert. den.* 296 U. S. 620 (1935)—1926 Act; *Forbes* v. *Commissioner*, 82 F. (2d) 204 (C. C. A. 1, 1936)—1928 Act; *Twining* v. *Commissioner*, 83 F. (2d) 954 (C. C. A. 2, 1936) *cert. den.* 299 U. S. 578 (1936)—1928 Act.

[2] See further discussion on this point, *infra* pp. 34–38.

illustrated by quotations from a few of the cases. Thus, in *Pringle* v. *Commissioner*, *supra*, it was held that a contingent interest was not acquired under the Revenue Act of 1921 until the termination of the preceding life estate. The Court said (pp. 864–865):

> It is not questioned that a person can not be said to have "acquired" property within the meaning of the Revenue Act, §202 (a) (3), *supra*, before he has some substantial ownership therein. If his interest is contingent upon the happening of some future event, until the happening of that contingency when his interest becomes vested, he has merely a possibility of acquiring an estate and can not be said to have any substantial ownership therein. *The rulings of the Department of Internal Revenue have consistently been to the effect that where one has merely a contingent interest in property he does not "acquire" that property until his interest becomes vested* * * *.
>
> Petitioners' interests in the property becoming vested on July 25, 1923, it was on that date that they "acquired" the property within the meaning of section 202 (a) (3) of the Revenue Act of 1921, *supra*, and the value of the property on that date should have been taken as the base for determining the gain or loss from the sale. * * *.
>
> *The cases of Brewster* v. *Gage*, 280 U. S. 327, *and Chandler* v. *Field* (C. C. A. 1), 63 F. (2d) 13, *are not controlling here. In each of those cases the interest of the taxpayer became vested immediately upon the death of the testator.* (Italics supplied.)

Similarly, in *Hopkins* v. *Commissioner*, *supra*, under the Revenue Acts of 1924 and 1926, the court said, after reviewing the earlier cases (p. 12):

> In all the cases, it was considered that the controlling factor was whether the interest created by the will was a vested or a contingent one, thereby determining whether the date of death or the date of distribution was to be taken as the basis for ascertaining gain or loss from the sale of the estate properties.

Perhaps the leading case decided before the enactment of the Revenue Act of 1934 was *Lane* v. *Corwin, supra.* That case involved the application of the Revenue Act of 1928 to a contingent interest. The court distinguished *Brewster* v. *Gage* in the following terms (p. 770):

> The Brewster Case presented a different question from that at bar. Here we have a different statutory provision. The reference to an executor's trust estate and the view that a residuary legatee's right to property at the death of the testator enriched him at that time can not be said to lead to a similar result where an express trust is set up by will even if a different statute was not involved. *The postponement of the legatee's actual dominion over the property during the duration of the executor's trust estate for the purpose of administering the estate is entirely different from the postponement of dominion, which might never be realized, by an express trust which might last for many years and prevent the taxpayer from ever obtaining the property outright.* * * *.
>
> Since the interest of the appellants was merely contingent and not vested, they should not be considered as having acquired the property at the time of the death of the testatrix * * *. (Italics supplied.)

The construction established by these cases has been consistently adhered to in the decisions which have come down since the enactment of the Revenue Act of 1934. Thus, in *Warner* v. *Commissioner, supra,* involving the Revenue Act of 1921, the Court referred to the fact that *Brewster* v. *Gage* did not deal with contingent interests, and said (p. 228):

> * * * we have preferred to assume, as other courts of the United States and the parties here have done, that a vesting of some recognized sort is necessary if the date of death, rather than the termination of the trust, is to be taken as the time when the interest of the taxpayer is "acquired."

This decision was cited with approval in *Twining* v. *Commissioner, supra,* where the court said (p. 955):

In *Warner* v. *Commissioner*, 72 F. (2d) 225, this court held that the test for determining when a remainder was "acquired," within the meaning of the Revenue Act, is whether it is vested or contingent. It is true that the revenue act there under consideration was the 1926 act, but the problem of what was meant by the word "acquired" was not different from what it is under the 1928 act. Literally, therefore, the first sentence of the above-quoted section 113 (a) (5) applies; the property "was acquired by general * * * devise." Had the remainder been contingent, then the last sentence of the section would have been applicable. Such was the case of *Lane* v. *Corwin*, 63 F. (2d) 767 (C. C. A. 2).

The same construction was also accepted by the Circuit Court of Appeals for the Third Circuit in two cases. In *Roebling* v. *Commissioner*, 78 F. (2d) 444 (C. C. A. 3, 1935), the court said (p. 446):

> The time of the "acquisition" of the property by the petitioner depends upon whether he received a vested or contingent interest under his father's will * * *.

And in *Beers* v. *Commissioner*, 78 F. (2d) 447 (C. C. A. 3, 1935), *cert. den.* 296 U. S. 620, the court said (p. 449):

> When did the taxpayer *acquire* the properties devised in trust, on the death of the testator or on conveyance to him by the trustee?
> * * * If a contingent remainder, he acquired them by conveyance at the end of the trust in 1925, and their value at that date controls the calculation.

These cases have been reviewed at this length because they show so plainly the clarity and uniformity of the construction which was adopted by the courts, a construction which was uniformly accepted—with no dissenting voice—when the Revenue Act of 1934 was under consideration. Indeed, we have altogether, in addition to the rulings of the Bureau and the decisions of the Board, eleven decisions of Circuit Courts of

Appeals accepting this construction—all after *Brewster* v. *Gage* was decided—*and with certiorari denied by the Supreme Court six times, in every case in which it was applied for.* It is difficult to see how the construction of the words could be more clearly and firmly established.

The Revenue Act of 1934.

With this background in mind, we may now consider the specific legislative history of the Revenue Act of 1934. The first public step in the formulation of that Act came on December 4, 1933, when a Subcommittee of the Committee on Ways and Means filed a Report proposing changes in the Revenue Act of 1932. With respect to §113 (a) (5) of the Revenue Act of 1932, the Subcommittee said (p. 17):

> Included within the phrase "all other cases" is personal property acquired by general or residuary bequest. Thus, where a trustee acquires personal property by general bequest, the basis of the property, on a sale by him, is the value at the time of distribution to him. The basis to the executor, in all cases, is the value of the property at the date of the decedent's death.
>
> Oftentimes, the executor and trustee under a will are one and the same person. Thus, in the case of a general bequest of personal property, he is in a position to make use of one basis of valuation or the other according to which will most benefit the estate. The trustee, of course, may use a later basis than the executor, and where it is desired to sell personal property subject to a trust during the period of administration, the executor-trustee may determine whether it would be most advantageous to sell as executor or as trustee. Where the personal property has increased in value in the hands of the executor, under a general bequest, the property may be distributed to the trustee, who may use the higher basis in computing gain or loss on the sale, thereby diminishing the taxable increment and greatly reducing or entirely avoiding the income tax.
>
> Section 113 (a) (5) of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to the meaning of the term "date of acquisi-

> tion," which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined "the date of acquisition" to mean the date of death in the case of all property passing by bequest, devise, and inheritance, *whether real or personal.* (*Brewster* v. *Gage*, 280 U. S. 327.) Your subcommittee recommend that section 113 (a) (5) of the Revenue Act of 1932 be changed to conform to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, *whether real or personal.* (Italics supplied.)

This Report makes it apparent that what the Subcommittee had in mind was the different rules of basis which might be applicable to substantially identical interests acquired under the same will, *depending upon whether the property was real or personal.* It is easy to read the phrase "uniform basic rule" in the Report with complete and unwarranted generality of application. But that is not an accurate reading of the Report. On the contrary, the Report itself clearly shows that the uniformity to which the Subcommittee was referring was uniformity with respect to vested interests *as between realty and personalty*, and so that the quite unwarranted option available to *executors* under the 1928 and 1932 Acts would no longer be available.

That Congress did not have in mind at all the question of contingent interests is shown by the legislative and judicial history which has just been detailed. That the Treasury Department had no idea that the proposed restoration of the pre-1928 language in the statute was going to remove all problems was made immediately apparent. Shortly after the Report of the Subcommittee was made, the Acting Secretary of the Treasury filed a printed Statement relating to the Subcommittee's Report. This Statement contains the following passage on the point under consideration (p. 16):

> The Treasury submits that the proposed amendment to section 113 (a) (5) presents no improvement over the present statute, and therefore, in accordance with the policy that no change should be made unless it results in a

material improvement of the statute, the Department believes that the amendment should not be adopted.

The understanding of the Treasury was clearly confirmed at the Hearings before the Committee on Ways and Means. At those Hearings, the Treasury was represented by Mr. Roswell Magill. The proposed amendment to §113 (a) (5) was specifically considered. Mr. Magill first presented the Treasury's view as expressed in the Statement of the Acting Secretary of the Treasury. The Hearings then continue as follows (pp. 144–145):

> Mr. Magill. * * * I take it that the subcommittee and the Treasury are in agreement as to what the basis should be in these cases. The subcommittee report suggests that under decisions of the Supreme Court the basis would be, in the absence of a statutory provision, what the statutory provision provides, and hence that you will simplify the law by taking out the express statutory provision. We are not clear that that would be true *because the decision covers only one or two points*, whereas the subdivision covers several, and there may be some doubts which would be created by such a change that are settled by the present wording.
>
> Mr. Cooper. I think the object of the subcommittee was to try to get a uniform rule.
>
> Mr. Magill. Yes.
>
> Mr. Cooper: That would apply all the way through.
>
> Mr. Magill. The Treasury is in entire agreement with you as to your purpose. The only question is whether that would be accomplished, if you did not have the specific provision. Your report, I take, quite fully states the situation on that point, and I do not know of any other evidence to submit than what you already have in your report.
>
> Mr. Hill. I think it would be very well at this point to have Mr. Stam state the reason for this recommendation here in the subcommittee's report.
>
> Mr. Colin F. Stam, counsel, Joint Committee on Internal Revenue Taxation. That is 16. There were some cases where the *executor might act as trustee*, and he would have his option as to what basis he could take in case of

property passing by general bequest. In other words, under the 1932 act, if he made distribution to himself as trustee, he would take as the basis the value of the property at the date of distribution. On the other hand, *if he sold the property himself as executor*, he would take as the basis the value of the property at the date of death. So he would have a choice there between those two, and we thought that was unfair; that we ought to have one definite, fixed date.

Mr. Magill. We would agree with you on that.

Mr. Stam. Then there is another point, where the *executor* buys property and does not distribute the original property to the distributee, but buys other property. Under the 1932 rule the distributees would take the basis at the date of distribution rather than the cost to the executor of that new property.

Mr. Magill. Which is not correct.

Mr. Stam. We thought it was a bad rule, because the appreciation has escaped taxation entirely.

Mr. Magill. That is true. I quite agree with you on both cases. I think the question simply is whether it would be better to put in some specific language which would cover those cases, or whether you can obtain the results you want by taking out all of the present provisions on the subject. (Italics supplied.)

It was following this Hearing that the Ways and Means Committee made its Report which is merely a verbatim transcript of the Report of the Subcommittee, and thus adds little, if anything, to the legislative picture. The House adopted the Bill as proposed by its Committee. The only change made by the Senate was the addition of the words "or by the decedent's estate from the decedent," which appear in the final enactment. The Senate Committee Report again simply repeats the language of the Subcommittee's Report.

The Proper Construction of §113 (a) (5) of the 1934 Act.

This examination of the legislative history shows, particularly in the light of the background previously outlined, that the main motive for reenacting the pre-1928 language was to

prevent an executor of an estate from having a profitable choice of basis when the executor was also the trustee of a trust set up by the will of the decedent, and also to take care of the situation where an executor buys property and distributes it to a legatee. The "uniform rule" mentioned by Mr. Cooper in the Hearings, and the "uniform basis rule" in the Committee Report refer to these problems, *and to the divergent rules* prescribed under the 1928 and 1932 Acts *for vested interests, as between real and personal property. There is no mention of the treatment of contingent interests, no complaint with the practice of the Bureau, or the decisions of the Board and the Courts. No thought is suggested, either in the Hearings or in the Committee Reports, that the construction made so uniformly by the Bureau, the Board, and the Courts, with respect to contingent interests, should be changed. The attention of Congress was directed to the divergent basis rules which existed in the case of interests which were clearly vested.* What was in mind was a *uniform rule for vested interests.* This is emphasized by the reference to *Brewster* v. *Gage*, which, as has been pointed out, involved a clearly vested interest. It is also emphasized by the words "*whether real or personal,*" which appear twice in all three of the Reports.

This conclusion is well summarized in the dissenting opinion in the *Augustus* case in the Board:

> It seems to me that the reports to which the majority opinion refer went no further than to make plain that the purpose of the language was to adopt the construction which the Supreme Court of the United States had put upon similar language in *Brewster* v. *Gage*. I think that the court in *Pringle* v. *Commissioner*, makes clear that *Brewster* v. *Gage* did not decide the question we have in the instant case.

The quotation from the *Pringle* case which is thus referred to has already been set out at p. 15 above.

There is not a syllable in the Hearings, Committee Reports, or elsewhere, to indicate that Congress contemplated that the rule which it was establishing would in any way affect the

already well-settled rule as to the basis of contingent interests. On the contrary, it deliberately adopted language which had at that time been clearly construed to draw a distinction between vested and contingent interests, without intimating even by inference or innuendo that it intended to abandon this distinction. The Committee Report which the Board below found to be "conclusive" in fact furnishes no basis for the conclusion that Congress intended the wholly incongruous and illogical result that the pre-1928 language, without any change of any sort, would, when restored to the statute, take on a meaning wholly different from that which it had uniformly been construed to have.

Such a *tour de force* should not be ascribed to the Congress which used the simple, well-understood, words of this statute. If Congress had intended the result for which the Treasury now contends, it would have enacted the clear and simple rule of the House Bill of 1928 (see pp. 8–9, *supra*). But this language was rejected by Congress in 1928, and it was not put into the Bill in 1934. *Congress has never enacted it.* The position of the Treasury here that the pre-1928 language restored to the 1934 Act has the same meaning as the never-used language of the discarded 1928 Bill. Such a construction can only be reached by ignoring the words actually used by Congress, and the clear lesson from the history of the statute.

There is a concluding piece of evidence on the meaning of the 1934 Act which seems to be of great importance. It will be recalled that Mr. Magill, later Under Secretary of the Treasury, was the representative of the Treasury at the Hearings on the 1934 Act. In 1936, two years after the statute was passed, he published his book on "Taxable Income.". In this book, he discussed the present problem in the following language (pp. 388–389):

> The courts, however, have clung tenaciously to the vested-contingent distinction * * *. In its recent regulations, however, the Treasury has abandoned the distinction and declared that hereafter the basis shall be the value as of the date of the creation of the remainder in all cases. In

> view of the court decisions in the cases cited, the effectiveness of this administrative action is questionable. If there is merit in the argument that Congress, by reenacting prior statutes which have been uniformly interpreted by the Treasury, has given such interpretations the force of law, then *it should take congressional action to change the interpretation*. (Italics supplied.)

The Treasury's own representative in the drafting of the statute thus shows his understanding that the restoration of the pre-1928 language did not carry with it the change of meaning which the Board has given to it. Certainly if Congress had intended anything else, it would have made its meaning clear and would have written a Committee Report which would have dealt with this specific problem, and not merely with questions arising as to unqualifiedly vested testamentary gifts.

In the light of the uniform construction which had been given to the words which Congress used in 1934, it can not be fairly said that the statute then enacted was in any way ambiguous. Indeed, the meaning which had been given to the words in question was simply the natural meaning of the words used. The word "acquired" is not a word of vague or shadowy meaning. It is defined in New Century Dictionary and in Webster's New International Dictionary, 2d edition, published in 1934, as meaning "to get as one's own."[1] This definition has been authoritatively approved by the Supreme Court in *Helvering* v. *San Joaquin Fruit and Investment Co.*, 297 U. S. 496, 499 (1936), where the Court had to consider the meaning of the word "acquired" as used in the very sections of the earlier Revenue Acts from which the present §113 was derived. The Court said (p. 499):

> The word "acquired" is not a term of art in the law of property but one in common use. The plain import of the

[1] Bouvier's Law Dictionary: "To make property one's own. It is regularly applied to a permanent acquisition."

word is "obtained as one's own." Language used in tax statutes should be read in the ordinary and natural sense.[1]

It can hardly be said that a person has obtained property as his own when he has a mere hope, expectancy or possibility of obtaining it. This is clearly shown by the fact that if the petitioner's interest was contingent and he had died before the happening of the contingency (viz., before reaching the age of 28), no part of the property would have been subject to estate tax in the petitioner's estate under Treasury Regulations of long standing;[2] this is in sharp contrast with the decision below that the petitioner "acquired" the property on the death of his father.

It will be remembered that the instant will provided that "*until*" the respondent attained 28 years he should have only certain income, and that "*when*" he became 28 he "*shall become entitled to*" (R. 18) a share of the trust corpus. In applying the rule of the *San Joaquin* case, *Deputy* v. *Du Pont*, the *Maillard* case, and the *Old Colony* case, all *supra*, we turn to *Bouvier's Law Dictionary* to find the ordinary, natural, popular, and received import and sense of the word "entitled." That authority gives the following: "*Entitle. In its usual sense, to entitle is to give a right; therefore a person is said to be entitled to property when he has a right to it.*"

---

[1] In the recent case of *Deputy* v. *Du Pont*, 308 U. S. 488, 493, the Court (per Mr. Justice Douglas) said: "And when it comes to construction of the statutory provision * * * the general rule that 'popular or received import of words furnishes the general rule for the interpretation of public laws.' *Maillard* v. *Lawrence*, 16 How. (U. S.) 251, 261, is applicable."

The most complete exposition of the rule is in *Old Colony R. Co.* v. *Com'r.*, 284 U. S. 552, 560:

> The rule which should be applied is established by many decisions. "The legislature must be presumed to use words in their known and ordinary signification." * * * "The popular or received import of words furnishes the general rule for the interpretation of public laws." * * * The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and ingenuity and study of an acute and powerful intellect would discover." * * *

[2] *Cf.* Regulations 80 (1937 ed.) Art. 13: "Nothing should be included, however, on account of a contingent remainder in the case the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death."

By his new regulation petitioner says that "all titles" must relate back to the death of the decedent, regardless of the nature of the interest when decedent died. The regulation purports to rely upon *Brewster* v. *Gage.* But neither *Brewster* v. *Gage* nor the statute give any support to such a theory of relation-back; and that theory may not be used to change the settled meaning of a word not in any sense a word of art. In *Brewster* v. *Gage* the remainder interest was vested at decedent's death. The enjoyment and possession was merely postponed. Therefore, the receipt of possession and enjoyment merely related back to the vesting of the property right. However, that does not mean that the vesting of an estate shall relate back to an arbitrary date prior to its existence.

In the *San Joaquin Fruit & Inv. Co., supra,* the Supreme Court, after using the language just above quoted, said:

> *The fiction of relation,* indulged in to defeat those dealing with the legal title with knowledge of the option, *can give no aid in solving the question of the time of the optionee's acquirement of property under a statute taxing gain upon a subsequent sale.* (Italics supplied.)

In the instant case the issue involves the time of acquisition of certain securities. It is true the petitioner came into possession and enjoyment of them at April 4, 1934. However, it is equally true that the Supreme Court of North Carolina says that until April 4, 1934, he did not become entitled (i. e., he did not have any right) to any interest in the trust property, and that unless and until he reached 28 he had no right (i. e., was not entitled) to anything except to receive certain income if, as, or when it became payable to him. In other words the date of acquisition of title coincided with the date of receipt of possession and enjoyment. Therefore, petitioner's property right was not acquired until April 4, 1934.

One final point firmly buttresses all that has been said before. When Congress legislates, it is the *statute* which is the law, and it is the meaning of the *statute* which must be sought. Congress can not legislate by committee report. On the contrary, com-

mittee reports are only relevant as they shed light on an ambiguous statute; a committee report can not be relied on to import into a statute an ambiguity which is not there. Even if the committee reports involved here were themselves clear, specific, and unambiguous, they would furnish no basis, therefore, for changing the meaning of the words which Congress actually used in the statute itself. The rule stated in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 89 (1935), seems squarely applicable here:

> We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used.

Here, if the committee reports are disregarded, it seems wholly fair to say, in the light of the uniform departmental and judicial construction, that "there can be no doubt of the meaning of the words used." Congress can not use "gray" in a statute and make it mean "black" by saying so in a committee report. And this is *a fortiori* true where, as here, the committee reports contain nothing which deals in any way specifically with contingent interests such as those here involved, so as to show any intention that the statutory words should mean anything different from what they had uniformly been construed to mean in the earlier Acts.

The effort of the Commissioner to make the words of the statute mean what they clearly did not mean when they were put back into the statute in 1934, would seem to fail as a piece of wishful boot-strap lifting. The situation is analogous to that involved in the recent decision of the Supreme Court in *Helvering* v. *Wood*, 309 U. S. 344. In that case the Court struck down an attempt by the Commissioner to extend §166 of the statute beyond the meaning of the words actually used by Congress. The Court, per Mr. Justice Douglas, used language which seems directly applicable here:

> Whether as a matter of policy such nice distinctions should be perpetuated in a tax law * * * is not for us. We have only the responsibility of carrying out the Congressional mandate * * *. The legislative history corroborates this conclusion.

All of the foregoing legislative history clearly shows that when in the 1934 Act Congress reenacted the identical provisions of prior revenue acts, Congress did not mean to prescribe the same rule regardless of whether the legacy was obtained as one's own or was merely expectant, hoped-for, and without factual substance. *Patently Congress did not say so, and it is clear that Congress did not intend so.*

THE STATE LAW IS BINDING AS THE RULE OF PROPERTY.

It is established that the rule of property and interpretation of wills is concluded by the State law.

In *Blair* v. *Com'r,* 300 U. S. 5, the precise question was before the Court. The Court said (pp. 9–10):

> The supervening decision of the state court interpreting that law in direct relation to this trust can not justly be ignored in the present proceeding so far as it is found that the local law is determinative of any material point in controversy.[1]
>
> The question of the validity of the assignments is a question of local law. The donor was a resident of Illinois and his disposition of the property in that State was subject to its law. *By that law the character of the trust, the nature and extent of the interest of the beneficiary,* and the power of the beneficiary to assign that interest in whole or in part, *are to be determined. The decision of the state court upon these questions is final.*[2] * * * To derogate from the

[1] Citing *Freuler* v. *Helvering,* 291 U. S. 35; *Hubbell* v. *Helvering,* 70 F. (2d) 668.

[2] Citing: *Spindle* v. *Shreve,* 111 U. S. 542, 547, 548; *Uterhart* v. *United States,* 240 U. S. 598, 603; *Poe* v. *Seaborn,* 282 U. S. 101, 110; *Freuler* v. *Helvering,* 291 U. S. 35, 45.

> authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction.
>
> In the face of this ruling of the state court it is not open to the Government to argue that the trust "was, under the Illinois law, a spendthrift trust." The point of the argument is that, the trust being of that character, the state law barred the voluntary alienation by the beneficiary of his interest. The state court held precisely the contrary. The ruling also determines the validity of the assignment by the beneficiary of parts of his interest. That question was necessarily presented and expressly decided. (Italics supplied.)

In addition to the authorities cited above, see also:

Sharp v. *Com'r*, 303 U. S. 624 (1938);
Erie R. Co. v. *Tompkins*, 304 U. S. 64 (1938);

The construction of the Reynolds will is to be determined according to the law of North Carolina, and the statement of that law by the North Carolina courts is conclusive and binding.

Decisions of the Courts of North Carolina defining the interest of petitioner herein.

The writ in the instant case relates only to the federal question and, therefore, all dispute is eliminated as to the validity and application of the decision reported in *Reynolds* v. *Reynolds*, 208 N. C. 578. We have therefore only to examine that decision to see what was the nature and extent of respondent's rights and interests under his father's will.[1]

[1] For a summary of the factual and jurisdictional findings of the North Carolina Courts in *Reynolds* v. *Reynolds, supra*, the attention of this Court is respectfully invited to "Memorandum for the Respondent" filed in the instant cause in respect of the petition for certiorari filed herein.

In the decision in *Reynolds* v. *Reynolds*, *supra*,[1] the findings and decision of the lower court were affirmed, and it was set out therein that in a former suit the instant respondent had contended that he had acquired and was the owner of the securities comprising the trust corpus and that, as such owner, he was entitled to include in his annual statement the income received from the trust estate as earnings of securities belonging to him or in which he had an interest. The Supreme Court of North Carolina had decided that issue adversely to respondent's contentions (201 N. C. 267), and in the decision affirmed in *Reynolds* v. *Reynolds*, *supra*, it is thus recited:

> That one of the issues raised in said case * * * was the following:
>
> 2. Whether if the contention of the trustee is correct, the plaintiff is not entitled to include in his annual statement income received from his share of the trust estates of his father * * * *as "earnings* of money, *stocks or bonds owned by him."*
>
> That * * * in said cause * * * *the argument was squarely presented to the Court, that the children of R. J. Reynolds owned vested interests in his estate with a period of postponed possession* until they should respectively attain the age of 28 years, *subject only to be divested by death* before arriving at that age, *which argument was considered by the court and expressly rejected* as appears in its opinion heretofore referred to. * * * Therefore, the Court holds as a matter of law that the *children of R. J. Reynolds did not receive any vested interest* in the trust estates of * * * their father * * *; that by the will of their father *they had only* the right to receive, if, as and when payable, certain income from said estate, *and the possibility of receiving* property *vested both in interest and possession if, as, and when they should respectively attain the age of 28 years;* * * * (Italics supplied.)

---

[1] See ¶ 35 of Judgment and Decree, pp. 664–666 of Exhibit A (and also pp. 721–723 of Exhibit B) referred to in the Stipulation at R. 56, and in footnote at bottom of p. 34 of petitioner's brief.

In the same decision[1] the Court said:

(a) The will of R. J. Reynolds did not bequeath or devise to Zachary Smith Reynolds any vested interest or share in the trust estate (or any part thereof) created and established by said will. A proper construction and interpretation of said will shows that no part of the trust estate established thereby, and none of the accumulated income thereof, would have vested in the said Zachary Smith Reynolds unless and until he arrived at the age of twenty-eight years. Until the said Zachary Smith Reynolds arrived at said age of twenty-eight years, **the only interest which he had** in the trust estate established by said will (or any part thereof) **was to receive such payment from the income thereof**, if, as, and when payable to him, under the terms of said will. Consequently, upon the death of the said Zachary Smith Reynolds, prior to reaching the age of twenty-one years, no part of said trust estate (either corpus or income) was transferred from him to any one.

From the foregoing we see that the North Carolina Courts have specifically interpreted this will and have decided and held:

1. The *only* right which this respondent had under his father's will was to receive certain payments of income if, as, and when payable to him;
2. Beside this right to receive certain restricted income all that respondent had was the possibility (if, as, and when he should attain the age of 28) to receive property which (if, as, and when he should attain the age of 28) he would then obtain both in interest and in possession;
3. Prior to reaching the age of 21 respondent had *no part* of said trust estate (either corpus or income) which he could transmit to any one;

---

[1] See ¶ 60 and 60 (a) of Judgment & Decree, pp. 680–681 of Exhibit A (also p. 737 of Exhibit B) above referred to. All of the findings, statement, rulings and holdings of the Superior Court were recited *in haec verba* by the Supreme Court in its decision affirming the lower court.

4. Respondent did *not* have an interest which was vested but subject to a period of postponed possession;
5. Respondent did *not* have an interest which was vested but subject to defeasance or divestment by death prior to age 28;
6. Respondent could not obtain, receive, *or acquire*, any *interest* or any *possession* unless and until he should have attained 28 years.
7. The will did not bequeath or devise to respondent *any interest or any share in* the trust estate (or any part thereof).
8. *No part* of the trust estate (and *none of the accumulated income* thereof) *would* have vested in him *unless* he attained the age of 28, and *until* he attained the age of 28.

Petitioner argues (or rather assumes arguendo) that respondent had an interest (albeit a contingent interest) in the trust corpus. Obviously such an assumption is taken for the purpose of arguing that if this Court has, under any and all circumstances, abolished all distinction between vested and contingent interests, then a contingent interest in this respondent would bring the same result as if he had a completely vested interest.

But petitioner's assumption is without any basis. A careful study of the foregoing decision of the North Carolina courts fails to disclose even a suggestion that respondent has any interest or estate whatsoever in the trust corpus—contingent or otherwise. On the contrary, every sentence of the State decision bristles with negatives. The Courts down there stated, in as many different ways as there was of saying it, that respondent *did not have any interest or estate whatsoever* in the trust estate (or of any part thereof), or in any of the accumulated income; that he did not, and could not, have acquired any such interest unless and until he reached the age of 28; that when he reached 28 his interest and his possession would both be acquired at the same time; and that unless and until that time arrived all the respondent had was a right to some income and a possibility of receiving property if, as, and when he should attain the age of 28.

The Court was very careful to make it clear that respondent was devoid of an interest. If a person is devoid of all interest in an estate, he can not possibly be said to have "acquired" the whole of that estate.

The decisions of the Courts of North Carolina firmly establish that respondent did not "acquire" the trust estate at his father's death.

It is equally clear that the North Carolina decisions likewise dispose of the question as to the securities bought by the Trustee with the income accumulated in the trust. The North Carolina decisions decide and hold that "none of the accumulated income *would have* vested" in respondent "*unless and until*" he arrived at the age of 28. Words could not be clearer than that: They mean that not only the accumulated income *did not belong* to respondent, but that *it could not* belong to him "unless" and "until" the time came when he might acquire an interest both vested and in possession, simultaneously.

Now it follows, as night follows the day, that if the accumulated income did not belong to respondent, it certainly could not become his merely because the Trustee went out and spent it. If that accumulated income was not his (and the North Carolina Courts say it was not his), then when that accumulated income was turned into securities, those securities did not become his either.

It is equally true that if the securities owned by his father were not his, the exchange of these securities for other securities would not make the latter securities belong to respondent. This is no less true in case the earlier securities were sold and their proceeds used to buy new securities.

The proposition that a person can "acquire" property before he can own it or have an interest in it, or have a right to it, resolves itself into a patent absurdity when one considers the problem of when a posthumous child, or an unborn beneficiary, would "acquire." No one but a person *in esse* can acquire or own anything. Yet it is just as sensible to argue that a person "acquired" property (i. e. obtained the ownership thereof as his own) 16 years before his birth, as it is to argue that he

"acquired" a similar property in which the law says he had no interest, estate, ownership, right, or possession.

The law of North Carolina[1] is binding upon all Federal Courts and tribunals, and is determinative of this controversy.

A BUREAU REGULATION CAN NOT ALTER OR AMEND THE LAW, AND ONE WHICH ATTEMPTS TO DO SO IS VOID.

For many years the statute provided that the basic date for property, acquired as in this case, should be the value of the property at the time of such acquisition. The law so stood in the Revenue Acts of 1918, 1921, 1924, and 1926. The Regulations promulgated under all those acts provided the same test.

The Supreme Court in *Brewster* v. *Gage* said that where, upon testator's death, a beneficiary acquires a *vested* interest, the basic date is the date of testator's death.

A large number of Circuit Court and Board decisions held that the decision in *Brewster* v. *Gage* applied only to those cases in which a "vested" estate was acquired at testator's death; *and that where the interest acquired at testator's death was a mere contingent interest, the acquisition did not take place at the date of testator's death, but took place at the date on which the beneficiary acquired a substantial ownership of the property.*

The General Counsel ruled that where the interest acquired at testator's death was not a substantial interest, the basic date was not the date of testator's death but was the date on which the beneficiary acquired a substantial ownership of the trust corpus; and that the Departmental Regulations so interpreted and construed the statute.

The Supreme Court in *Brewster* v. *Gage* said that the Regulations promulgated under sec. 202 (a) of the 1918 Act, sec. 202 (a) (3) of the 1921 Act, sec. 204 (a) (5) of the 1924 Act, and sec.

[1] The decision of the Supreme Court in *Reynolds* v. *Reynolds*, *supra*, is in accord with, and supported by, more than a century of consistent precedents in its decisions. *Kent* v. *Watson*, 17 N. C. (2 Dev. Eq.) 366; *Giles* v. *Frank*, 17 N. C. 2 Dev. Eq.) 521; *Gill* v. *Weaver*, 21 N. C. (L. Dev. & Bat.) 41; *Anderson* v. *Felton*, 36 N. C. (1 Ire. Eq.) 55; *Whitesides* v. *Cooper*, 115 N. C. 570; *Freeman* v. *Freeman*, 141 N. C. 97; *McRae* v. *Commerce Union Trust Co.*, 199 N. C. 714.

204 (a) (5) of the 1926 Act, were reasonable and in accordance with the letter and spirit of the statute; that a reversal of that construction would produce inconvenience and inequality; that the substantial reenactment in later acts in light of such construction is persuasive evidence of legislative approval of the regulations; that such subsequent legislation confirmed and carried forward the policy of such enactments as interpreted by said regulations, and that the said regulations will not be disturbed.

It was in light of all the foregoing that Congress reenacted the exact provisions of the 1921, 1924 and 1926 Acts in sec. 113 (a) (5) of the 1934 Act.

"Possible doubts as to the proper construction of the language used [in a statute] should be resolved in light of its administrative and legislative history." *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492.

"Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Com'r* v. *Winmill*, 305 U. S. 79.

"And again, when, for a considerable time, a statute notoriously has received a construction in practice from those whose duty it is to carry it out, *and afterwards is reenacted in the same words*, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed." (Italics supplied.) *Copper Queen Consol. Min. Co.* v. *Arizona*, 206 U. S. 474.

"And we have decided that the reenactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction." *United States* v. *Cerecedo Hermanos y. Compania*, 209 U. S. 337.

"If the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so to do requires the conclusion that the regulation was

not inconsistent with the intent of the statute * * *." *Massachusetts Mutual L. Ins. Co.* v. *United States,* 288 U. S. 269.

"This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong."[1] *Universal Battery Co.* v. *United States,* 281 U. S. 580.

To the same effect:

United States v. *Alabama Great Southern R. Co.,* 142 U. S. 615;
Murphy Oil Co. v. *Burnet,* 287 U. S. 299, 322;
National Lead Co. v. *United States,* 252 U. S. 140;
United States v. *Farrar,* 281 U. S. 624;
United States v. *Jackson,* 280 U. S. 183;
Fawcus Machine Co. v. *United States,* 282 U. S. 375;
Old Colony R. Co. v. *Com'r,* 284 U. S. 552;
Helvering v. *Bliss,* 293 U. S. 144;
Old Mission P. Cement Co. v. *Helvering,* 293 U. S. 289;
Koshland v. *Helvering,* 298 U. S. 441;
Commissioner v. *R. J. Reynolds Tob. Co.,* 306 U. S. 110.

The Revenue Act of 1934 was enacted in light of the foregoing, and the rule is controlling here. The rule has thus become "embedded in the law" so that it would take an Act of Congress to change it. *E. R. Squibb & Sons* v. *Com'r.,* 98 F. (2d) 69.

In 1935 the Commissioner purported to change the law by promulgating a regulation (Reg. 86, art. 113 (a) (5) (b)) to the effect that the acquisition of an interest or title in property relates back to date of decedent's death, regardless of when such acquisition in reality takes place.

But the Commissioner can not thus make a fact something which it is not. Even the Congress can not do so. *Schlesinger*

---

[1] It can not be argued here that the regulations were plainly wrong because the Court said in *Brewster* v. *Gage* that they were proper regulations and had the force and effect of law.

v. *Wisconsin*, 270 U. S. 230; *Heiner* v. *Donnan*, 285 U. S. 312. "Treasury regulations can add nothing to income as defined by Congress." *Blatt* v. *United States*, 305 U. S. 267. A Treasury regulation "can not here be construed to create income or dividends in a case where none otherwise existed when the facts are measured by the statute. Income can not be created by fiat alone." *Taplin* v. *Com'r*, 41 F. (2d) 454, 456. "A regulation to be valid must be reasonable and must be consistent with law." *Commissioner* v. *Van Vorst*, 59 F. (2d) 677, 679, affirming 22 B. T. A. 632; *Morris-Poston Coal Co.* v. *Com'r*, 42 F. (2d) 620, 621.

The new regulation is not consistent with law or with fact. It attempts to say that the petitioner acquired the trust property when he did not acquire it. Such a distortion of facts and legal principles deprives the statute (and the decisions) of any meaning, and gives the Commissioner "a power to re-write the statute more broadly than Congress obviously intended." *Rovensky*, 37 B. T. A. 702.

It is clear from all the foregoing that the word "acquisition" had a well recognized judicial meaning which Congress adopted in the 1934 Act, and which could not be changed by a departmental regulation.

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress *as expressed by the statute.* A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Manhattan General Equipment Co.*, 297 U. S. 129.

In view of the established judicial and departmental construction placed upon the word, and in view of the absence of any intention of Congress to change that construction, and in view of the absence of any controlling reason for assuming that Congress intended such a change, it is submitted that the attempted change of the established meaning of the word

"acquisition" by a regulation is invalid, ineffective, and a mere nullity.

An invalid regulation receives no sanction by statutory reenactments. It will be remembered that the 1934 Act changed the law as it had existed *only under the 1928 and 1932 Acts. It did not change the law from what it had been under the 1926 and previous Acts. The Committee Reports state that it was the purpose to restore the law as it had been under the 1926 and previous acts.* In enacting the 1934 Act, Congress adopted the construction which had been put upon all the previous acts. *G. C. M. 10,260* was two years old when the 1934 Act was enacted, and was promulgated two years after *Brewster* v. *Gage* was handed down. It was promulgated in the light of many Circuit Court and Board decisions, and the 1934 Act was enacted in light of G. C. M. 10,260 and of all those judicial decisions.

There is no more clearly established rule than that if a regulation is not sound, no subsequent re-enactment of a statute can give it any validity whatsoever. *Koshland* v. *Helvering*, 298 U. S. 441; *Helvering* v. *Gowran*, 302 U. S. 238, 242; *Blatt Co.* v. *U. S.*, 305 U. S. 267; *Woolworth Co.* v. *U. S.*, 91 F. (2d) 973; *Com'r* v. *Shattuck*, 97 F. (2d) 790; *Helvering* v. *Kimberly*, 97 F. (2d) 433. Cf. *Helvering* v. *R. J. Reynolds Tob. Co.*, 306 U. S. 110.

Regulations 86 do not apply to this case anyway.

As we have shown, Regulations 86, Art. 115 (a) (5)–1, are totally incompatible with the statute and the intent of Congress, and constitute an attempted act of legislation on the part of the Department. However, even the Regulations do not go so far as to say that the date of decedent's death is basic unless the taxpayer acquired *some interest or estate* in the trust corpus when decedent died. The Regulations include contingent estates, conditional estates, and about every kind of estate or interest that could be thought up. But, whether inadvertently or intentionally, there was a complete failure to specify that even though taxpayer acquired no interest of any kind what-

soever, the date of decedent's death was basic anyway. That omission removes the instant case from the ambit of the Regulations, since under the laws of North Carolina he did not obtain or acquire any interest or estate whatsoever at his father's death.

In no event should the changed Regulation be applied retroactively to years prior to its promulgation.

Regulations 86 were approved by the Secretary on February 11, 1935, and were later promulgated. Thus the Regulations on which the petitioner now relies were not even in existence in the year in which the instant transactions took place. Therefore, under no circumstances should those regulations be retroactively applied to a year prior to the existence of such regulations, and to a year *during all of which the opposite rule stood published to the world* as the Departmental rule of construction and interpretation.

This precise point was recently decided by this Court in *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115. This Court covered this point completely, saying:

> Petitioner urges that the amendment operates retroactively and governs the ascertainment of gross income for taxable periods prior to the date of its promulgation, * * * We hold that the respondent's tax liability for the year 1929 is to be determined in conformity to the regulation then in force.
>
> Section 605 of the Revenue Act of 1928 provides that "In case a regulation or Treasury decision relating to the internal-revenue laws is amended by a subsequent regulation or Treasury decision made by the Secretary or by the Commissioner with the approval of the Secretary, such subsequent regulation or Treasury decision may, with the approval of the Secretary, be applied without retroactive effect." It is clear from this provision that Congress intended to give to the Treasury power to correct misinterpretations, inaccuracies, or omissions in the regulations and thereby to affect cases in which the taxpayer's liability had not been finally determined, unless, in the judgment of the Treasury, some good reason required that

> such alterations operate only prospectively. The question is whether the granted power may be exercised in an instance where, by repeated reenactment of the statute, Congress has given its sanction to the existing regulation.
>
> Since the legislative approval of existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed.

The provisions of Regulations 86 should not be applied to the transactions involved in this case.

RESPONDENT'S ANSWER TO POINTS MADE BY PETITIONER IN BRIEF.

Petitioner's argument is a legislative argument and not a judicial argument, and it should be addressed to the Congress and not to the Court.

Petitioner's main argument, in this as in many other cases, is a legislative argument rather than a legal argument. It is addressed to the desirability of preventing so-called increments from going untaxed, and the desirability of eliminating the complexities of tax administration to the end that the Commissioner's job may be more simple and easy. Since Congress is the branch of government which is supposed to impose taxes, it is obvious that the taxation or non-taxation of so-called increments is a matter of legislative policy. Congress has known of all these matters for many years. So long as our American form of Government is adhered to, it would seem that this Court should not be called upon to apply tax policies and to devise and formulate general statutory schemes for quick and easy collection of taxes.

Petitioner argues that Congress thought, rightly or wrongly, that *Brewster* v. *Gage* defined the date of acquisition to mean the date of decedent's death, regardless of whether it actually passed then or not. His argument is that if Congress had not

so meant, it would have said so. Is it not more reasonable to argue that if Congress had meant what petitioner says he thinks Congress meant, Congress would have simply said, "* * * the basis shall be the fair market value of such property at the date on which decedent died"? Petitioner's argument comes to this: Congress did not say what it meant to say, although it would have been quite easy to say what it meant [1]; therefore, the Court should substitute (in the statute) the words "at decedent's death" for "at the time of such acquisition"—in order to make it easier for the Department to construe the act in the manner in which it desires to construe it.

Petitioner argues that by reason of a "scheme of federal taxation," it must be held that when Congress said that property shall be valued at the date of its acquisition, Congress really meant to say that it should be valued at the date of another's death—regardless of whether under the law of property, the taxpayer actually acquired it then, or not.

Petitioner argues to the effect that the paramount principle, in the scheme of taxation, is that everything must be taxed, regardless of whether the statute specifically lays the tax or not; and that if Congress fails to lay the tax it must be inferred that such failure was inadvertent and the tax must nevertheless be laid, on the general theory applicable to the strict interpretations of statutory exemptions. Respondent challenges that argument.

The paramount principle of taxation is that no one but Congress can lay a tax, and that the subject of the tax is defined by Congress and can not be enlarged by any one. A clear statement of this long established rule is found in *United States* v. *Merriam*, 263 U. S. 179:

> On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most

[1] And although an amendment was proposed and passed the House, which said precisely that, such amendment was rejected by Congress.

important, for such statutes are not to be extended by implication beyond the clear import of the language used.

The same case (*U. S.* v. *Merriam*) quotes from the famous rule laid down by the House of Lords in *Partington* v. *Atty. Gen.*, L. R. 4 H. L. 100, 122:

> If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, can not bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

The rule is clearly stated in *Gould* v. *Gould*, 245 U. S. 151:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.

This rule has been repeated and invoked by the courts over such a long period of years that it has become axiomatic in the law.[1]

Another paramount canon of construction, with many years of history, is set out in *Old Colony R. Co.* v. *Com'r*, 284 U. S. 552, 560:

---

[1] It is impracticable to review all such cases. We call attention to: *United States* v. *Isham*, 17 Wall. 496; *Knowlton* v. *Moore*, 178 U. S. 41; *Eidman* v. *Martinez*, 184 U. S. 578, 583; *Smietanka* v. *First Tr. & Sav. Bk.*, 257 U. S. 602; *Schwab* v. *Doyle*, 258 U. S. 529; *Weiss* v. *Stern*, 265 U. S. 242; *Niagara Falls Brewing Co.*, *Burnet* v., 282 U. S. 648, 654; *Old Colony R. Co.* v. *Com'r*, 284 U. S. 552.

> The rule which should be applied is established by many decisions. "The legislature must be presumed to use words in their known and ordinary signification." * * * "The popular or received import of words furnishes the general rule for the interpretation of public laws." * * * "The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and ingenuity and study of an acute and powerful intellect would discover."

In *Crooks* v. *Harrelson*, 282 U. S. 55, it is held that the literal meaning of the statute shall not be rejected and a construction adopted in harmony with what is thought to be the spirit and purpose of the law. There must be something to show plainly that the intent of the legislature was that the letter of the statute is not to prevail.

Another paramount rule is that an omission in the statute can not be supplied by a court. Nor can a court supply what is conceived to be an omission, even though it be conceived that, without supplying the omission, the statute would lead to mischievous results. *Crooks* v. *Harrelson, supra; U. S.* v. *Goldenberg*, 168 U. S. 95; *O'Donnell*, 35 B. T. A. 251.

Respondent urges that the *foregoing landmarks of statutory construction* are paramount to the general abstraction that in the general scheme of taxation Congress means to tax all that is comprehended within the statute levying the tax. "Paramount principle" is but the statement of a truism which is to the effect that when Congress says a thing must be taxed, it means what it says. Such a generality, while obvious, can not take precedence over the recognized canons of construction we have noted above.

Petitioner's argument implies that we are here dealing with a statutory exemption. Such is not even remotely the case. There is no question here of statutory exemption and there is no occasion for invoking the doctrine applicable thereto. The matter of capital gains and losses is purely arbitrary and the basis is a purely statutory concept. It is a sword which cuts

both ways. The much labored point about a tax loss on increment in value is entirely illusory. Such a thing may happen in a case where values have increased between a decedent's death and the taxpayer's acquisition. But on the other hand, there are periods of decline in which the trend is down, instead of up, and a *depreciation* instead of an appreciation results—and there is a loss instead of an increment. In such case the rule works the other way and the Government gains by the necessity of the taxpayer taking the lower value as his base. There is no mystery about this. This is not a novel and startling discovery only just now made by the Department, the need for remedying of which is so imperative that it can not wait until the attention of Congress can be brought to it. Congress has always known of it. It's simply a rule which works both ways. The trouble with the present administrative position is that the petitioner wants the rule to work in his favor all the time. He labors the point of "untaxed increment," but he does not mention the other half of the time when the rule works his way.

The Decisions in Maguire, Gambrill, and Campbell cases are not controlling here.

All of those cases arose under a different statute, with a different history, and with a different basic intendment. They arose under the 1928 Act, which prior to its own way through Congress had no legislative history, and of course had no departmental or judicial history. The record of statutory intendment, however, is so plain that its truth can not be missed. Congress had seen the judicial, legislative and departmental history of the term "acquisition" develop and accumulate for about ten years, and through four tax statutes, as bearing upon the construction and meaning of the phrase "time of acquisition." In 1928 Congress decided to be more specific and accordingly provided that in certain circumstances the basic date was that of decedent's death, while in other circumstances it was the date of distribution to the taxpayer. That rule obtained through the 1928 and 1932 Acts.

Congress became dissatisfied with the provisions it had put into the 1928 and 1932 Acts and took counsel as to what to do. The Treasury Department saw no necessity for the change and told Congress so. But Congress had its own legislative purposes and intent. *Congress decided to abandon the rule of thumb and go back to the rule of property.*

At that time it was universally believed (the Department as well as the Courts sharing in the belief) that there was a distinction between vested interests and other interests. Congress undoubtedly believed there was such a distinction, as is shown by the legislative history. The Supreme Court, at that time, thought there was such a distinction since it specified in *Brewster* v. *Gage* that the legatee's right to have his share of the trust estate "vested immediately." A dozen or more Circuit Court decisions show that the Circuit Courts thought that common law property interests were relevant in statutory enactments. The Board's decisions show the same thing.

It was in the light of the common law rules of property, in light of the many Court and Board decisions, and in light of the general and accepted belief that the plain, ordinary, natural and received sense of the word "acquired" was "to obtain as one's own," that Congress decided to abandon the rule of thumb and go back to the defined and decided rule of property. Accordingly it returned to the exact phraseology of the Acts prior to 1928, and again adopted the word "acquisition" because Congress believed the meaning of that word was understood by everybody.

The statute should now be viewed from the point where Congress stood in 1934 and in light of the obvious Congressional understanding and intent at that time.

If property titles and interests, as universally understood in the law, are to cease to have relevancy in tax statutes, that interpretation should only be put upon statutes enacted after Congress had been apprized of that fact.

The recent decisions of this Court in *Maguire*, *Gambrill*, and *Campbell*, are not controlling here. This is for two reasons: (1) The inherent and basic difference in the statutory concept

between the 1928 Act and the 1934 Act, and (2) the basic predicate upon which those decisions rest is not present in the instant case.

First as to the statutes: The 1928 Act[1] provides by sec. 113 (a) (5) that:

> *If* personal property *was acquired* * * *, or *if* real estate *was acquired* * * *, the basis shall be the * * * value * * * at the time of the death of the decedent.
>
> *If* the property *was acquired* [by the executors from the decedent] * * * the basis * * * shall be the * * * value * * * at the time of the death of the decedent.
>
> In all other cases *if* the property *was acquired* * * * the basis shall be the * * * value * * * at the time of distribution to the taxpayer.

From the foregoing it will be noted that *in every instance* covered by the 1928 Act, the basic value was made to depend upon the condition that the property *was acquired.* The condition is specifically expressed by the conditional word "IF." Thus, no one can validly argue that "if" the "acquisition" of "property" did not take place at date of death, the basic date would nevertheless be the date of death. *Congress was not adopting an arbitrary "value-at-death" rule, and the language of the statute plainly shows it.*

Therefore, unless it can be shown that the taxpayer actually "acquired" the property at decedent's death, then the so-called "value-at-death" rule has no application.

To "acquire the property" one must acquire something of substance.[2] This Court has said over and over again that taxation is a practical matter and that substance must prevail over form. If, therefore, the "acquisition" was nothing of substance, but was only a shadow, a form, a hope, an expectancy, or a possibility, then it can not be said fairly or justly that he "acquired the property."

---

[1] And the 1932 Act which is like it.

[2] See the language used in *Maguire's* case, 111 F. (2d) 843, 847, affirmed by this Court that where the taxpayer has a *substantially vested interest at the time of distribution to the trustee,* then distribution to the trustee is distribution to the taxpayer.

Apparently this Court had the foregoing in mind in deciding the *Maguire*, *Gambrill*, and *Campbell* cases. In the first place, it should be noted that in every one of those cases the taxpayer had acquired a substantial property interest in the trust corpus.[1]

In *Maguire's* case this Court held that where the provisions of the trust were such that the taxpayer was the owner of an interest in the estate, the delivery of the property to a trustee was delivery to the owner because the former received it as the fiduciary or agent of the owner. As noted, the taxpayer in that case had a completely vested remainder interest. According to the opinion, it makes no difference whether such interest or estate is legal or equitable. So long as the will conveyed an ownership in property, the proceeds of that ownership may be delivered or distributed to the owner's representative. The foregoing point is emphasized by the Court in its reference to *Brewster* v. *Gage*, to the effect that there the interest of the residuary legatee was not "absolute." Admittedly, it was not absolute to the extent that the legatee had both title and possession.[2] But it can not be denied that so far as *legal title* went his interest was absolute. The Court in *Brewster* v. *Gage* said: "*Petitioner's right* later to have his share of the residue *vested immediately upon testator's death*." Now, leaving out for the moment the clause "later to have his share," the language

[1] In the *Maguire* case, the taxpayer obviously acquired a completely vested interest in the coupons. The only possible question was whether she would get a child's part or whether that part would be increased by her share of her mother's part. No other contingency or condition appears in that case.

In the *Gambrill* case, the taxpayer was (as petitioner admits, Bf. top. p. 20) a remainderman under his grandmother's will. He had a completed vested interest in the corpus after the life income estate of his mother. His was the estate of the usual and typical vested remainderman. As in the case of every living person there was the chance that he might not live to come into possession of the estate, but, if he did not, it went to his issue. Therefore he had the usual common law estate of the ordinary vested remainderman.

In the *Campbell* case, the trust provided that the taxpayer should receive certain specific parts of the trust corpus at certain specific periods with remainder over to her children or her heirs in the event of her not living to receive into possession all the shares of the trust bequeathed and devised to her.

[2] His possession was only delayed to the extent of the time necessary for administration. The beneficiaries, right was subject to no contingency or condition.

of the Court is, "Petitioner's right * * * vested immediately upon testator's death." Therefore his ownership of the remainder was absolute although the possession of it was deferred. To that extent only was it not "absolute."

The Court makes all this clear by saying: "Hence, in case of remainders governed by sec. 113 (a) (5) of the 1928 Act * * * it can not realistically be asserted that the date when the remainderman acquired his interest came later than the time when he obtained an equitable estate *under the testamentary trust,*" and (speaking to *Brewster* v. *Gage*): "That conclusion suggests that the critical date is the time when the legatee acquired some interest in the property * * *."

To that situation the Court applied the value-at-death rule.

The circumstances in the *Maguire* case are analogous to those in *Brewster* v. *Gage*. Maguire had "acquired" a vested and substantial interest and the Court held that the distribution did not have to be into his own hands in order to make it a distribution under the 1928 Act. *It is respectfully submitted that if Maguire had not previously "acquired" a substantial ownership of the property, the decision of this Court would have been otherwise in the Maguire case.*

The *Maguire* decision is grounded upon the fact that the taxpayer had a property interest in the trust res. *In the instant case* the North Carolina Courts have held that respondent did not have any interest or share whatsoever in the trust estate.

Respondent, therefore, respectfully submits that his case is not ruled or controlled by the *Maguire* decision.

In *Gambrill's* case the circumstances were substantially the same. The taxpayer was a vested remainderman. There can be no doubt about that. His interest as vested remainderman was not absolute for the reason that he had not yet secured distribution and possession. But he did have all the interest there was, except that. The Court makes that clear when it says: "* * * We look to the time when the taxpayer first acquired the interest which later ripened into full ownership."

Nothing need be added to the foregoing. The Court saw that taxpayer had owned *vested interests in the estate with a period of postponed possession.* On that basis the Court held that his representative could take distribution in his behalf.

The foregoing case does not rule the instant case because the Courts of North Carolina decided and held: "* * * *the argument was squarely presented to the Court, that the children of R. J. Reynolds owned vested interests in his estate with a period of postponed possession* until they should respectively attain the age of 28 years * * * *which argument was considered by the Court and expressly rejected* * * *."

Campbell's case is substantially similar in its factual aspects to *Maguire* and *Gambrill.* Again, the Court proceeded upon the theory that taxpayer's ownership of the property enabled the executors to make distribution of that ownership interest to taxpayer's agent.

Again the Court discusses the vested interest of a remainderman with possession postponed, and in doing so recognizes the vested nature of that ownership. Said the Court:

> While the property is held in trust, the vested remainderman has no more right of possession and control than the contingent remainderman. Yet *each has acquired* a property interest. The statutory provisions here in question come into play when *that interest* later *ripens into* full ownership * * *.

The point we stress again is that in every one of the above cases the Court first lays down the premise that ownership of the property (i. e., acquisition) occurred at decedent's death. Having established ownership and acquisition, the decision then proceeds to the point in question, viz: "distribution."

In the instant case *the point in issue* is "acquisition." It can not be assumed. It is an issue of fact and law. The law of North Carolina says this, respondent did not acquire any interest in the trust estate. As a matter of fact, aside from the law he never had any part of it.

It would seem to require no argument to establish that the "distribution" of something which already belongs to a person is a vastly different thing than the "acquisition" by that person of something which he did not own, and which did not belong to him, before that acquisition.

In each of the above cases it appears there was a vested interest with a period of postponed possession. We have shown that such was not the circumstance in the instant case.

In *Campbell's* case, it further appeared that taxpayer had an interest subject to defeasance or divestment, and from that he argued that he acquired the securities only from the date when his interest became indefeasible. In the instant case, respondent had no such interest. The Courts of North Carolina decided and held: "* * * *the argument was squarely presented to the Court, that the children of R. J. Reynolds owned vested interests in his estate* * * * *subject only to be divested by death* before arriving at that age (28), *which argument was considered by the Court and expressly rejected.*"

In the *Campbell* decision the Court summarizes by referring to its companion decision in the *Maguire* case, and says:

> As we remarked in *Maguire* v. *Commissioner of Internal Revenue, supra,* the residuary legatee in *Brewster* v. *Gage,* * * * *was held to have acquired his interest at date of death,* though at that time it was not absolute. (Italics supplied.)

It is obvious that a decision holding that a vested remainderman acquired his interest at decedent's death, is not controlling in a case where it appears that the taxpayer acquired no interest at all, or no substantial interest whatever, when the decedent died.

* * * * * *

In all of the above cases the decision is that an owner can receive distribution even though it is made to his agent. Attention is called to the fact that even that rule would seem not to apply in the instant case because of the provision and stipulation contained in "Item Eighth" of the Reynolds will wherein it is provided (R. 20):

> I hereby provide that all payments to be made hereunder to my beneficiaries shall be into their own hands

and not into the hands of others, whether claiming by their authority *or otherwise*.

* * * * * *

It is respectfully submitted that this case is not ruled by the decisions in the *Maguire*, *Gambrill*, and *Campbell* cases

The securities purchased by the Trustee were not acquired by respondent at the time of such purchase.

We have shown heretofore that the decisions of the Courts of North Carolina decided and held that:

1. *No part* of the trust, and *none of the accumulated income* thereof, would have vested in respondent *unless* and *until* he arrived at age 28.
2. The *only interest* which he had in the trust (or any part thereof) was to receive limited payments of income from time to time.

It stands to reason that since respondent had no interest either in the corpus of the trust or in the accumulated income thereof, then he had no interest in securities purchased by the Trustee with such accumulated income or with proceeds from sales of securities constituting the trust corpus. If he did not have an interest in such purchased securities, then patently he did not acquire them when the Trustee purchased them.

The first time he had any interest in those securities was at the time when the will of R. J. Reynolds said that he should have an interest in them, viz, April 4, 1934.

It is admitted that the basic value of these securities in respondent's hands was not their value at date of decedent's death.

Petitioner argues that sec. 113 (a) (5) of the 1934 Act does not provide for such a situation, and that there is no statutory provision specifically covering it, and that, therefore, sec. 113

(a) must be applied in default of anything better to apply. But that argument does not fit this case.

Sec. 113 (a) says that: "The basis of property shall be the cost of such property." *Whose cost?* The statute plainly intended to mean the cost to the person who sold it. That is made plain by the fact that Congress then proceedeu to set forth the exceptions—and in such exceptions are those cases where the seller did not have any cost basis.

It is clear that the instant respondent did not have any *cost* basis, because he did not buy the securities.

In *Maguire*, *Gambrill* and *Campbell* cases, this Court held that the trustee's cost was the taxpayer's basis. But in those cases the Court also held that the taxpayer had a substantial interest[1] in the trust property from the moment of decedent's death. That being so, the rationale of those decisions relative to "distribution" would apply to the purchase of securities by the trustee. This is so because if the taxpayer had an interest in the securities left by the decedent, then he had an interest in the income therefrom, and in the proceeds of any sale thereof. And if he had an interest in such income and proceeds, then he had an interest in the securities which were bought with such income and proceeds. If that be so, then it would follow that if the trustee could take a distribution on behalf of a taxpayer who had a substantial interest, then the trustee could make a purchase on behalf of a taxpayer who had a substantial interest in the purchase money. In such case the purchase price (or cost) to the trustee might be said to be the purchase price (or cost) to the taxpayer.

But no such logic can apply in a case (such as the instant case) where the taxpayer did not have such an interest. The trustee could not receive a distribution as the alter ego of such a person, nor could he make a purchase as the alter ego of such a person.

Therefore, since the trustee's purchase was not (in the instant

[1] In the decision in *Maguire's* case (111 F. (2d) 843, 847) which was recently affirmed, the Court below stressed the point that the taxpayer had a substantially vested ownership.

case) the purchase of the taxpayer, then the taxpayer's basis can not be said to be "cost" under sec. 113 (a).

It will not be presumed that Congress intended that there should be no basis whatsoever for determining gain or loss; and, per contra, it will be presumed that Congress intended the subject to be covered by the statute. Petitioner argues, in effect, however, that the statute made no provision for such a case, and that he has corrected the Congressional omission by supplying the necessary legislation. He argues that his Regulation 86, Art. 113 (a) (5)-1 (d) rules the case.

In the first place, Regulations 86 were not approved or promulgated until the year after the tax year here in question; and in the second place, Art. 113 (a) (5)-1 (d) shows on its face that it has nothing to do with the instant situation. Let us examine the Regulations.

Under the format of Regulations 86, each section or subsection of the *statute* is set forth in small type, and immediately following such section or subsection, appears the *Article* of the regulations which interpret that section or subsection. The *number* of the "article" corresponds with the number of the "*section*" or "*subsection*" *of the statute* which it interprets.

Thus, on page 177 of Regulations, appears "Sec. 113 (a)" of the statute. Immediately following that section appear the Articles of the Regulation interpreting that section.

Thereafter, on subsequent pages, appear subsections 113 (a) (1), 113 (a) (2), 113 (a) (3), 113 (a) (4) and following each of them appears the Article of the Regulations similarly numbered and identified as interpretative of it.

Thereafter, on page 181 appears *sec.* 113 (a) (5), which is the section here under discussion. Following that section appears *Article* 113 (a) (5) interpreting *section* 113 (a) (5). That *Article* 113 (a) (5) has seven subdivisions—all relating to the section which the article interprets, viz, sec. 113 (a) (5). Among those subdivisions of Article 113 (a) (5) appears Article 113 (a) (5)-1 (d), which reads as follows:

(d) Property acquired before March 1, 1913; reinvestments by fiduciary.—If the decedent died before March 1, 1913, the fair market value on that date is taken in lieu of the fair market value on the date of death, but only to the same extent and for the same purposes as the fair market value on March 1, 1913, is taken under section 113 (a) (14).

If the property is an investment by the fiduciary under a will (as, for example, in the case of a sale by a fiduciary under a will of property transmitted from the decedent, and the reinvestment of the proceeds), the cost or other basis to the fiduciary is taken in lieu of the fair market value at the time when the decedent died.

Subdivision (d) by its very terms applies only to property acquired before March 1, 1913, as to which the fiduciary has made a reinvestment. [1]

An article of a regulation interprets the section of the statute to which it relates and it does not construe and interpret some other section. *Walker* v. *United States*, 83 F. (2d) 103, 111.

The *title* of the Article is set out and emphasized by italics. The portion of the title referring to "reinvestments by fiduciary" is set off merely by a semi-colon, showing that it is merely a clause of the main title—"Property acquired before March 1, 1913."

In the *Maguire* case this Court gave significance to the title of sec. 113 (a) (5), "Property transmitted at death," and the language there used is particularly applicable here. The Court said: "It [the title] suggests * * * that the foregoing provision of Art. 113 (a) (5) was confined * * * to the specific property owned by the decedent at his death." In the instant case, the title more than suggests that it is confined to cases where

---

[1] If anything more were needed to establish respondent's contention here, it is to be found by referring to Art. 113 (a) (2) (Gifts after December 31, 1920) and Art. 113 (a) (3) (Transfers in Trust after December 31, 1920) in each of which articles appears a subdivision entitled "Reinvestments by fiduciary." This shows that the reference to "Reinvestment by fiduciary" in Art. 113 (a) (5) is *not a general* reference, but is limited to the terms of the Article to which it belongs.

"Property was acquired before March 1, 1913," and "*the property*" is an investment or reinvestment by the fiduciary.

Therefore, we submit that subdivision (d) of Art. 113 (a) (5) is not applicable here because by its position in the Regulations, by its context in relation to the other subdivision of the same article, by its plain terms, and by its title, it is shown to relate to another and different situation than the one here under consideration.

In the instant case, respondent's father did not die before March 1, 1913, and the fiduciary did not receive the property prior to March 1, 1913. In view of the very pointed limitations of the Article itself, it is patent that it does not apply here.

Petitioner argues (Bf. p. 28) that the "value-at-acquisition" should not apply to property purchased by a trustee, because the decedent never owned it.[1] But that argument gets him nowhere, because prior to April 4, 1934, the respondent never owned it either. He "*acquired*" his first interest in the property on that date. The ownership of the trustee was not his ownership, and the cost of the trustee was not his cost. The statute has made provision for the basis, viz, "time of acquisition," and the plain intendment of the statute should be observed.

---

[1] Petitioner compares sec. 113 (a) (5) with sec. 113 (a) (3). But that comparison proves nothing because sec. 113 (a) (3) relates only to *inter vivos* transfers in trust after December 31, 1920. The section and the Article of the Regulation interpreting it are as follows:

> (3) **Transfer in trust after December 31, 1920.**—*If the property was acquired after December 31, 1920,* by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made.

Art. 113 (a) (3)-1, construing the above section, says:

> **Art. 113 (a) (3)-1. Transfer in trust after December 31, 1920.**—(*a*) *Property included*—Section 113 (a) (3) applies in general to all property acquired after December 31, 1920, by transfer in trust. It does not apply to property acquired as a *gift* by transfer in trust, or by bequest or devise; or by an instrument which, under section 113 (a) (5), is to be treated as though it were a will. * * *

Respondent acquired all of the securities by bequest, devise or inheritance.

Sec. 113 (a) (5) says the basis shall be the value at "time of acquisition," if it was acquired by bequest, devise or inheritance. Bouvier's Law Dictionary defines "bequest" as "a gift by will of personal property," "devise" as "a gift of real property by last will and testament," and "inheritance" as: "It *includes all the methods* by which a child or relation takes property from another at his death * * *; as applied to personal property it can mean nothing else than to signify succession."

A taxpayer may become entitled to property by bequest, devise or inheritance, even though the decedent did not own it when he died. The point is clearly decided in *Dobbin* v. *Commissioner*, 31 F. (2d) 935, and 72 F. (2d) 984. There taxpayer received, by her husband's will, her husband's interest in a trust established by his brother. As a result of her acquisition of her husband's interest in the trust, taxpayer was to receive certain income later to accrue from the trust corpus. The question was whether the income came within Sec. 213 (b) (3) of the 1918 Act[1] which provided that gross income "does not include * * * (3) The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income)."

The Court held that the income to which taxpayer became entitled by reason of the will was a "bequest" within the meaning of Sec. 213 (b) (3). After a rehearing on the subject-matter the Court reaffirmed its decision, 72 F. (2d) 984. From the foregoing it clearly follows that property purchased by a trustee subsequent to decedent's death and acquired by the taxpayer by reason of his heirship, comes within the meaning of "bequest" or "inheritance" whether under the exactly similar provisions of 213 (b) (3) of the 1918 Act, 22 (b) (3) of the 1934 Act, or 113 (a) (5) of the 1934 Act.

The foregoing is supported by *Smith* v. *City of Providence*,

[1] Same as Sec. 22 (b) (3) of the 1934 Act.

9 Atl. (2d) 10, 13, where the Court considered a trust similar to that in *Dobbin's* case, and held that the trust income was part of a bequest.

The word "inheritance" is obviously a general or catch-all term intended to include any method by which property is passed from a decedent to another, which might not be included under "bequest" or "devise." Any provision in a *will* whereby property so passed would undoubtedly be included either in "bequest" or "devise." The word "inheritance" appears generally to apply to cases of intestacy. This is shown by *Commissioner* v. *Fletcher*, 59 F. (2d) 508, 510, where it was held that the word "inheritance" included the means whereby a tenant by the entirety received the property from her co-tenant upon his death.[1]

In *Lyeth* v. *Hoey*, 305 U. S. 188, this Court held that property received by an heir under an agreement compromising a will contest was property acquired by "inheritance" within the meaning of Sec. 22 (b) (3) of the 1932 Act[2] which exempts such property from income tax. This Court said (p. 196):

> Respondent agrees that the word "inheritance" as used in the federal statute is not solely applicable to cases of complete intestacy. The portion of decedent's property which petitioner obtained under the compromise did not come to him through the testator's will. *That portion he obtained because of his heirship* and to that extent he took in spite of the will and as in case of intestacy. (Italics supplied.)

---

[1] The Court said (p. 510):

> We think the word "inheritance" may be fairly construed to include this transfer, and we are convinced that Congress so intended it. While in legal parlance we generally regard the meaning of the word "inheritance" as the acquisition of property by one person as heir to another, yet it also means the act of possessing, receiving, obtaining, or succeeding to. The right to receive the entire property upon her husband's death came from the deed which created the estate by the entirety. The transfer to her of the interest therein which her husband had at the time of his death, and which transfer was necessary for her to completely hold and enjoy that right which the deed had given her, came from her husband's estate. She succeeded to her husband's right. She received and obtained and came into possession of it, and in that sense we think she must be considered as having inherited it from her husband's estate.

[2] Sec. 22 (b) (3) of the 1932 Act is identical with Sec. 22 (b) (3) of the 1918 Act, and contains the same pertinent provisions as Sec. 113 (a) (5) of the 1934 Act.

Respondent's position is further supported by a consideration of the case of property transferred in contemplation of death. With respect thereto Regulations 62, Art. 1563, provides as follows:

> In computing the gain or loss from the sale or other disposition of property acquired by gift on or before December 31, 1920, or by bequest, devise or inheritance, the basis shall be the fair market price or value of such property at the time of acquisition. The term "property acquired by bequest, devise, or inheritance" as used herein includes (a) such property interests as the taxpayer has received as the result of a transfer, or creation of a trust, in contemplation of or intended to take effect in possession or enjoyment at or after death. * * *.

Since under the Regulations "property interests," which a taxpayer receives as a result of a trust in contemplation of death, were included within the meaning of "bequest, devise, or inheritance," then *a fortiori* property or property interests received as a result of, or flowing from, or arising out of, a will creating a testamentary trust would be so included.

From all of the foregoing the following logical deductions seem inescapable:

Sec. 22 (b) (3) of the 1934 Act excludes from gross income "the value of property acquired by gift, bequest, devise or inheritance * * *." That clause is practically identical with that of Sec. 113 (a) (5) covering "property acquired by bequest, devise or inheritance * * *."

If, following the rationale of the *Maguire* case, the property in question was *not* "acquired by bequest, devise or inheritance" for the purpose of Sec. 113 (a) (5), then it was not "acquired by gift, bequest, devise or inheritance" for the purposes of Sec. 22 (b) (3); and therefore acquisition of such property might be deemed as taxable income.

Quite obviously Congress never meant to bring about any such result. The statute did not intend to treat as taxable income the property which this taxpayer acquired by reason of his heirship or by reason of the provisions of his father's will. It follows that when property is so acquired it must have a

basis, and clearly the only logical basis is its value at the date of acquisition, i. e., when the taxpayer became "entitled" to it.

It appears from the express language of the statute that the words "bequest," "devise" and "inheritance" in the 1934 Act were intended to include any property to which taxpayer became "entitled" as the result of the death of another person or as the result of his heirship. Secs. 113 (a) (5) of the 1928 and 1932 Acts attempted to separate various classes of acquisition arising or growing out of another's death. Sec. 113 (a) (5) of the 1934 Act does not do so. In light of that fact it should be concluded that, under the 1934 Act, the phrase "time of acquisition" means the time when taxpayer became entitled to any and all property which he acquired or "obtained because of his heirship," or acquired by or through or because of his father's will.

PETITIONER'S MOTION TO REVERSE.

Petitioner has heretofore filed a "Motion to Reverse." Thereafter he filed his brief in the cause. The instant brief of respondent is his brief in opposition to petitioner's "Motion to Reverse" and also his brief in the cause.

CONCLUSION.

The decision of the Court below should be affirmed.

Respectfully submitted,

J. Gilmer Körner, Jr.,
404 Transportation Building,
Washington, D. C.
Attorney for Respondent.

Of Counsel:
H. G. Hudson,
Stratton Coyner,
Winston-Salem, N. C.

INDEX TO APPENDIX.

Statutes	1
Regulations 86	2
Committee Reports	3
1928 Act: Joint Committee Report Jan. 28, 1928. H. Rep. #139	3
Ways & Means Rep. #2	4
Senate Finance Rep. #960	4
Conference Report H. Rep. 1882	5
1934 Act: Subcommittee, Ways & Means	6
Statement of Secretary of Treasury	6
Ways & Means Rep. #704	6
Senate Finance Rep. #558	7
General Counsel's Memorandum #10,260, C. B. X-1, 79 (1932)	7
Dissents in *Augustus* Case	13
Dissents in *Archbold* Case	15

APPENDIX.

Statutes and Regulations.

Sec. 113 (a) (5) of Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS—

(*a*) *Basis* (*unadjusted*) *of property.*—The basis of property shall be the cost of such property; except that—

* * * * * * * * *

(5) *Property Transmitted at Death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition.

Section 202 (a) (3) of the Revenue Act of 1921, c. 136, 42 Stat. 227, provided in part as follows:

In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition.

Section 204 (a) (5) of the Revenue Act of 1924, c. 234, 43 Stat. 253, provided in part as follows:

If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition.

Section 204 (a) (5) of the Revenue Act of 1926, c. 27, 44 Stat. 9, was the same as Section 204 (a) (5) of the Revenue Act of 1924.

Section 113 (a) (5) of the Revenue Act of 1928, c. 852, 45 Stat. 791, provided in part as follows:

Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the

time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer.

Section 113 (a) (5) of the Revenue Act of 1932, c. 209, 47 Stat. 169, was the same as Section 113 (a) (5) of the Revenue Act of 1928.

Regulations.

Reg. 86 (promulgated in 1935) provides:

Art. 113 (a) (5)-1. Basis of property acquired by bequest, devise, or inheritance.—(*a*) *Property included.*—Section 113 (a) (5) applies—

(1) to all property passing from a decedent by his will or under the law governing the descent and distribution of property of decedents; and

(2) to property passing under an instrument which, under section 113 (a) (5) is treated as though it were a will, but applies to such property only at the times and to the extent prescribed in section 113 (a) (5).

(*b*) *Basis.*—Under the law governing wills and the descent and distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113 (a) (5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property. For example, if distribution of

personal property left by a decedent is not made until one year after his death, the basis of such property in the hands of the legatee is its fair market value at the time when the decedent died, and not when the legatee actually received the property; or, if the bequest is of the residue to trustees in trust, and the executors do not distribute the residue to such trustees until five years after the death of the decedent, the basis of each piece of property left by the decedent and thus received, in the hands of the trustees, is its fair market value at the time when the decedent dies; or, if the bequest is to trustees in trust to pay to A during his lifetime the income of the property bequeathed, and after his death to distribute such property to the survivors of a class, and upon A's death the property is distributed to the taxpayer as the sole survivor, the basis of such property, in the hands of the taxpayer, is its fair market value at the time when the decedent died.

The purpose of the Act, in prescribing a single uniform basis rule for property acquired by bequest, devise, or inheritance, is, on the one hand, to tax the gain, in respect of such property, to him who realizes it (without regard to the circumstances that at the death of the decedent it may have been quite uncertain whether the taxpayer would take or gain anything); and, on the other hand, not to recognize as gain any element of value solely from the circumstance that the possession or enjoyment of the taxpayer was postponed. Such postponement may be, for example, until the administration of the decedent's estate is completed, until the period of the possession of enjoyment of another has terminated, or until an uncertain event has happened. It is the increase or decrease in the value of property reflected in a sale or other disposition which section 113 (a) (5) recognizes as the measure of gain or loss.

Committee Reports.

1928 Act.

The Report of the Joint Committee on Internal Revenue Taxation, dated January 11, 1928, and published as House Document No. 139, 70th Congress, 1st Session, contains the following passage (pp. 17–18):

BASIS FOR GAIN OR LOSS ON SALES BY AN EXECUTOR.

Until recently gain or loss on an executor's sale was measured by the value at the decedent's death of what was sold. As a result of the decision by the Court of Claims in *McKinney* v. *United States*, and the denial of certiorari by the United States Supreme Court, the rule was changed so as to provide that gain or loss on such a sale would be measured as though the decedent had sold the property during his life.

The rule of the *McKinney* case is inconvenient, for it is often impossible to determine the decedent's cost or other basis. Moreover, as a practical matter, it results in taxing the value of bequests, devises, and inheritances as income. The old rule seems preferable, and it is recommended that it be set forth in the statute.

Section 204 (a) (5) prescribes the basis when the beneficiary sells the property as the value at the time of "acquisition." Some doubt has arisen as to what is meant by the date of acquisition. The "date of death" is recommended to make the basis certain and definite.

The applicable portion of the Report of the House Committee on Ways and Means (House Report No. 2, 70th Congress, 1st Session, p. 18) is set out in full at p. 9 of this brief.

The Report of the Senate Committee on Finance (Senate Report No. 960, 70th Congress, 1st Session) contains the following passage (p. 26):

SEC. 113.—BASIS FOR DETERMINING GAIN OR LOSS—EXECUTORS' SALE.

The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in Section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.

It appears that the House bill is inadequate to take care

of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

The Conference Report on the Revenue Act of 1928 (House Report No. 1882, 70th Congress, 1st Session) contains the following passage (p. 14):

Section 113 (a) (5) is amended (No. 75) so as to provide that in the case of specific bequest of personalty or a general or specific devise of realty or the transmission of realty by intestacy the basis shall be the fair market value of the property at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the

beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary; and the House recedes, * * *

1934 Act

The applicable portion of the Report of the Subcommittee of the Committee on Ways and Means, dated December 4, 1933, and entitled "Prevention of Tax Avoidance," is set out at pp. 18, 19 of this brief.

This was followed by a Statement of the Acting Secretary of the Treasury, the relevant paragraph of which is set out at p. 20 in this brief.

The Report of the Ways and Means Committee (House Report No. 704, 73d Cong., etc., pp. 27–28) is substantially the same as the Report of the Subcommittee referred to above. The portion quoted by the Board in the *Augustus* case is as follows:

> Section 113 (a) (5) of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 Act. The change in the 1928 Act was made because there was some doubt as to the meaning of the term "date of acquisition," which was the term used under the Revenue Act of 1926. Since the 1928 Act was passed, the Supreme Court has defined "the date of acquisition" to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster* v. *Gage*, 280 U. S. 327 [2 U.S.T.C. ¶451.]) Section 113 (a) (5) of the bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether

real or personal. The section also includes a provision relating to general powers of appointment exercised by will, which was explained in connection with section 113 (a) (4).

The Report of the Senate Finance Committee (Senate Report No. 558, 73d Cong., etc., pp. 34–35) is simply a transcript of the Report of the Subcommittee, above referred to.

The relevant portions of the Hearings on the 1934 Bill are set forth on pp. 20–21 of this brief.

G. C. M. 10,260, C. B. X–1, 79 (1932).

This ruling, promulgated in 1932, states that it is for the purpose of clarifying the Department's position and stating its reasons for holding that when distribution is made to a trust beneficiary the time of acquisition is the time when substantial ownership is acquired by the beneficiary.

There, B, the testatrix, had in 1880 devised property to D in trust, to pay life income to A, and at A's death to pay income to A's children until the youngest became 21 years of age, at which time the Trustee, D, was to distribute the corpus to such children or their representatives. A died in 1926. All of her children were then 21. Distribution to them was completed in 1927. Sales of the property were made by the recipients in 1928.

The ruling makes an exhaustive analysis of the legislative history, including House and Senate Committee Reports, in order to arrive at the intent of Congress, and, *inter alia*, says as follows:

> The first question is whether the children of A (the grandchildren of the testatrix) "acquired" the property before March 1, 1913. It is concluded that the answer is in the negative, and for two reasons: * * * in the second place, their interests were wholly contingent under the law of Pennsylvania until the death of their mother in 1926; and the position of this office has been that one who has a mere contingent interest does not "acquire" the

property in question until his interest becomes vested. [Citing rulings.] (Mid. p. 80.)

* * * * * * * * *

* * * it will be assumed that the shares of M Company stock were delivered to the beneficiaries in kind on the termination of the trust in 1926. Under this assumption, it would appear at first glance that the basis of such shares, when sold by the beneficiaries in 1928, would be the fair market value of such shares at the time of decedent's death in 1880. * * * Nevertheless, it is entirely clear that Congress can not have intended such cases as the instant case to be governmed by the first sentence of sec. 113 (a) (5), because both the Senate Finance Committee report and the Conference Committee Report specifically state that the first sentence of the subsection was intended to apply to those cases *where the beneficiary secures substantial ownership at the decedent's death* (bot. p. 81). (Italics are those of the Ruling.)

* * * * * * * * *

In the instant case it is evident that the property did not, "as a matter of substance," vest in the grandchildren "immediately upon the decedent's death." * * * even if they were in being at that time, their interests were most unsubstantial because they were entirely contingent upon their continuing to be alive at the death of their mother. * * *

However, it is not necessary to rely solely on the Committee Reports. The very spirit and purpose of sec 113 (a) (5), as revealed not only by the Committee Reports but also by its own language and legislative history, are to fix the basic date at, and not before, the time *substantial ownership is acquired by the particular taxpayer in question* (mid. 82). (Italics supplied.)

After analyzing the decision in *Brewster* v. *Gage* and the *Matthiessen* cases, the Ruling continues:

The third sentence specifically shows that Congress regarded the ownership of an ordinary distributee or general legatee to be *too insubstantial at the decedent's death* to warrant fixing his basic date as of that time. If this is so in the case of an ordinary legatee or distributee where the only contingency involved is the possibility that the

decedent's estate may be consumed in paying debts, or in satisfying other prior legacies, it is much more true in the case of a taxpayer who is not even in existence at the decedent's death, *or in the case of a taxpayer who,* although then in existence, *has at that time, only a contingent remainder.* The interests of such persons are not only subject to the possibility that the decedent's estate may be consumed by debts, but they are also subject * * * to the contingency that they may never outlive the life tenant. To fix the basic date of the property in the hands of such persons at the time of the decedent's death, while postponing the basic date of the property in the hands of ordinary legatees and distributees until the *date of distribution,* would be inconsistent and unreasonable, and *directly opposed to the spirit and purpose of sec. 113 (a) (5). It would achieve the very opposite of what Congress intended* (mid. p. 83). (Italics supplied.)

The ruling then points out that a different interpretation would "cause absurd, illogical, and inconsistent results * * * between contingent remaindermen themselves and * * * contingent remaindermen and ordinary distributees * * * depending on when their remainders vest" and then proceeds, *at mid.* p. 84 *to mid.* p. 85:

Furthermore, it is well known that the gravest doubt exists as to the constitutionality of *any Federal law* attempting to levy an income tax on sums realized by reason of an increase in value of property occurring before the effective date of the income tax amendment. [*Citing Lucas* v. *Alexander,* 279 U. S. 573.] Yet this would frequently result if the basic date for *contingent remaindermen* of specific bequests or of realty is ascertained under the first sentence of sec. 113 (a) (5).

The situation, then, is this: It is evident on the face of the statute, by comparing the first sentence of section 113 (a) (5) with the third sentence, and by comparing the first sentence with section 113 (b), that Congress could never have intended the first sentence of section 113 (a) (5) to apply to persons *whose interests, at the decedent's death, were not substantial,* and of course not to persons who were not even in existence at that time. An examination of the

committee reports and of the legislative history further establishes this *beyond all shadow of doubt,* and if any reinforcement were necessary it is present in the fact that such an interpretation would raise the *gravest doubts as to the constitutionality of the statute.* This being so, does the mere fact that the literal language of the first sentence applies to all persons acquiring specific bequests and to all those acquiring realty by devise or intestacy, require that such sentence be held applicable to contingent interests in such properties? In the opinion of this office there is no such requirement. It is only necessary to infer four words in two different places in the first sentence of section 113 (a) (5) in order to make the sentence carry out the plain intent of Congress. The sentence would then read:

> If personal property was *substantially* acquired at *decedent's death* by specific bequest, or if real property was *substantially* acquired *at decedent's death* by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. (Italics are those of the ruling.)

In other words, the phrase, "at decedent's death" and the word "substantially" are inferred in two places in the sentence, and since it is perfectly obvious that this inference corresponds with the intent of Congress, and that any other construction brings about the most illogical, absurd, unjust, and probably unconstitutional results, the insertion of the words is abundantly justified as a matter of statutory construction. [Citing 2 Lewis' Sutherland Statutory Construction, 2d ed., sec. 382.]

* * * * * * * * *

It is of course obvious from the foregoing that the first sentence of section 113 (a) (5) is incongruous and leads to the most absurd results if it includes interests which were not substantially acquired by the taxpayer at the decedent's death. * * *

The Ruling reviews the authorities on statutory construction and says, top. p. 88:

In view of the foregoing, it is the opinion of this office that the first sentence of section 113 (a) (5) is not appli-

cable to personal property acquired by specific bequest, or to real property acquired by general or specific devise, or by intestacy, except in those cases where the taxpayer in question has *acquired substantial ownership of the property at the time of the death of the decedent*, and that, consequently, the basis of the property in the hands of the children of A is not governed by that sentence. (Italics supplied.)

The Ruling then discusses at length the law as to "distribution" and continues, at mid. p. 93:

* * * Obviously, the "time of distribution" that Congress had in mind is the time of distribution of the decedent's *estate* (the "estate" just referred to in the preceding sentence), and not the time of some delivery of corpus attending the distant termination of a trust or legal life estate. It was not the latter question, moreover, which was in issue in the two cases forming the chief legislative background for the third sentence of section 113 (a) (5). The question in issue in those cases (the Matthiessen case, *supra*, and the district court's decision in *Brewster* v. *Gage, supra*) was whether a residuary legatee "acquired" any "property" from the decedent prior to the original distribution of the decedent's estate, and Congress enacted the third sentence of section 113 (a) (5) to settle this controversy. There was no controversy over the question of whether the time of a legatee's acquisition of property should be still further deferred until the termination of a testamentary trust or the death of a legatee for life, and Congress must have assumed that distribution to a testamentary trustee or to a tenant for life was distribution to a *vested* beneficiary or *vested* remainderman. (Italics supplied.)

The Ruling then discusses at length the case of *contingent interest* and says, at mid. p. 96:

As already stated the purpose of the foregoing discussion is to present in more complete form the principal reasons underlying the position of the Bureau to the effect that contingent interests in specific bequests and realty are governed by the third sentence of section 113 (a) (5) rather

than by the first sentence, *and to perform a similar task with respect to the position that distribution to a testamentary trustee is distribution to such cestuis que trust as acquire substantial equitable ownership through the distribution to the trustees.* However, under the will of B in the instant case, her grandchildren did not acquire substantial equitable ownership when the property was distributed to the trustees. As stated in the first part of this memorandum, the interests of the grandchildren were contingent until the death of A, the life beneficiary, on June ——, 1926. Contingent beneficiaries or remaindermen are not regarded as having "acquired" property under the Revenue Acts, and, consequently, in such cases "distribution" *as well as acquisition, is necessarily contingent until substantial ownership vests,* at which time distribution to them is automatically concluded. (Italics supplied.)

* * * * * * * * *

In the instant case, since the interests of the grandchildren were contingent until A's death in 1926, and then became substantially vested (all of the grandchildren having then reached the age of 21), it is the opinion of this office that *distribution to the trustee of the testamentary trust did not constitute distribution to the grandchildren but was contingent,* as to them, until their interests substantially vested on A's death in 1926, * * * (mid. p. 97). (Italics supplied.)

At mid. p. 101 the Ruling discusses the matter of the distribution to beneficiaries of securities purchased by the Trustee, and says:

If certificates of stock were delivered to the sons which did not compose part of the original trust corpus but were purchased by the trustee with proceeds of the sale of such corpus, then the basis of such stock in the hands of the sons is the same basis the purchased stock had in the hands of the trustee—which basis, presumably, would be the cost to the trustee. * * * In other words, *with the exception of cestuis que trust whose interests are contingent* * * * the basis * * * is not to be regarded * * * as personal property "acquired by specific bequest" * * *. *On the other hand, where the interest of the cestuis are originally contingent, the property they acquire "by will" is the property as it*

exists when their interests become substantially vested, * * *. (Italics supplied.)

Dissenting Opinion in the Augustus Case, 40 B. T. A.

BLACK, *dissenting:* It is petitioner's contention in this proceeding that the interest which she received in the property conveyed by her father's will to a testamentary trust was a contingent remainder and that this interest in such property did not become vested until the date of the death of her mother, November 9, 1928.

The law of New York controls the question. *Forbes* v. *Commissioner,* 82 Fed. (2d) 204. Under the laws of the State of New York, I think petitioner had only a contingent remainder under the terms of the testamentary trust. Under the will of petitioner's father, petitioner's mother, the life tenant, had not only the right to the income from the property, but also the right to take for her own use so much of the principal as she might wish or desire, she being the sole judge as to whether she should consume the principal. By the terms of the will it was only the residue of the principal of the fund so remaining in the testamentary trust at her death which was to be disposed of by the trustee to the remaindermen. The remainder thus created was contingent and not vested. See *In matter of Dinkel,* 133 Misc. 868; 234 N. Y. S. 97; *Matter of Nugent,* 142 Misc. 594; 255 N. Y. S. 236; *Matter of Bonner,* 157 Misc. 810; 285 N. Y. S. 283; *Louis Kalb,* 15 B. T. A. 886.

If, under the testamentary trust involved in this proceeding, the remainder interest of petitioner was contingent, petitioner did not "acquire" the property within the meaning of section 113 (a) (5) of the Revenue Acts of 1934 and 1936 until the death of the life tenant. *Lane* v. *Corwin,* 63 Fed. (2d) 767; *Pringle* v. *Commissioner,* 64 Fed. (2d) 863; *Forbes* v. *Commissioner, supra; Louis Kalb, supra.*

The language of 113 (a) (5) of the Revenue Acts of 1934 and 1936 is precisely the same as the language of a similar section in the 1926 Act and prior acts. Although this is true, the

majority opinion construes the language of section 113 (a) (5) of the Revenue Acts of 1934 and 1936 to fix the date of "acquisition" as the same whether the remainder interest is vested or contingent.

This construction given by the majority opinion seems to rest largely upon reports of the House Ways and Means Committee and the Senate Finance Committee, which accompanied the bill which became the Revenue Act of 1934. It seems to me that the reports to which the majority opinion refer went no further than to make plain that the purpose of the language was to adopt the construction which the Supreme Court of the United States had put upon similar language in *Brewster* v. *Gage*. I think that the court in *Pringle* v. *Commissioner, supra,* makes clear that *Brewster* v. *Gage* did not decide the question we have in the instant case. There the court (Ninth Circuit) said, among other things:

> The cases of *Brewster* v. *Gage*, 280 U. S. 321, and *Chandler* v. *Fields*, 63 Fed. (2d) 13, are not controlling here. In each of those cases the interest of the taxpayer became vested immediately upon the death of the testator.

To the same effect, I think, is *Lane* v. *Corwin, supra,* although it involved a different statute.

Under the authorities I have cited, I think the date of petitioner's acquisition of the property in question was the date of the death of her mother, November 9, 1928, which terminated the testamentary trust and vested the property in petitioner, and not the date of the death of her father, July 13, 1922.

For the reasons I have stated, I respectfully dissent from the majority opinion.

ARUNDELL, VAN FOSSAN, MURDOCK, and DISNEY agree with this dissent.

Dissenting Opinion in the Archbold Case, 40 B. T. A.

KERN *dissents.*

BLACK, *dissenting:* It is the contention of petitioners in these proceedings that in the deeds of trust involved there were no words making a present gift of the remainders to the petitioners. That the only so-called "words of gift" are found in the direction to transfer the *corpora* of the trusts to the respective petitioners upon the happening of a future contingency, viz., their reaching the age of twenty-one years; that in view of this, it follows that futurity was annexed to the substance of the gifts and, therefore, the time of vesting of the remainders was suspended until the happening of the contingency upon which the gift was limited.

The law of New York controls the question whether the remainders were vested or contingent. *Forbes* v. *Commissioner,* 82 Fed. (2d) 204. Under the laws of New York, I think they were contingent. *Lewisholm* v. *Henry,* 179 N. Y. 352; *Dickerson* v. *Sheehy,* 156 App. Div. 101; affirmed without opinion, 209 N. Y. 592. If, under the deeds of trust involved in these proceedings, the remainder interests of petitioners were contingent, then they did not "acquire" the property within the meaning of section 113 (a) (4) of the Revenue Act of 1932 until the happening of the contingency upon which the remainders were limited. Then it was that their interest in the property became vested. *Lane* v. *Corwin,* 63 Fed. (2d) 767; *Pringle* v. *Commissioner,* 64 Fed. (2d) 863; *Forbes* v. *Commissioner, supra.* The vesting of the interest of the petitioners in the properties here involved occurred at the time each of them reached the age of twenty-one years and the securities were distributed to them. The fair market value on that date, I think, is the basis which should be used for determining gain or loss, rather than the basis determined in the majority opinion.

For the reasons I have stated, I respectfully dissent from the views of the majority.

ARUNDELL, VAN FOSSAN, MURDOCK, and DISNEY agree with this dissent.

BLANK PAGE

FILE COPY

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 684.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

RICHARD J. REYNOLDS.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF AMICI CURIAE.

ORVILLE SMITH,
ERWIN N. GRISWOLD,
Amici Curiae.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

BLANK PAGE

INDEX.

	Page
Question presented	1
Statute involved	2
Argument	2
I. Section 113(a)(5) and its legislative and judicial history	2
II. The effect of events subsequent to the re-enactment of the statute	5
A. Article 113(a)(5)-1 of Regulations 86	6
B. The Hallock case	11
C. The Maguire, Gambrill, and Campbell decisions	13
III. The property was not acquired by the respondent until 1934	19
Conclusion	25

CITATIONS.

Cases:

Augustus v. Helvering, 118 F. (2d) 38, No. 819	1, 3n., 6, 21, 25
Beers v. Commissioner, 296 U.S. 620	15n.
Brewster v. Gage, 280 U.S. 327	6, 15, 16, 18
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673	18n.
Burnet v. Harmel, 287 U.S. 103	12
Commissioner v. Bartlett, 113 F. (2d) 766	10n.
Commissioner v. Winslow, 113 F. (2d) 418	10
Corwin v. Lane, 290 U.S. 644	15n.
Great Northern Ry. Co. v. Sunburst Oil Refining Co., 287 U.S. 258	18n.
Helvering v. Campbell, decided March 31, 1941	6, 13, 14
Helvering v. City Bank Farmers Trust Co., 296 U.S. 85	5

Page

Helvering v. Gambrill, decided March 31, 1941 6, 13, 14, 15
Helvering v. Hallock, 309 U.S. 106 3, 6, 11, 12, 22
Helvering v. Janney, 311 U.S. 189 9, 11
Helvering v. Oregon Mutual Life Ins. Co., 311 U.S. 267 10
Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, No. 684 2, 7, 9
Helvering v. San Joaquin Fruit & Investment Co., 297 U.S. 496 14, 18, 19, 24
Helvering v. Wood, 309 U.S. 344 9
Hopkins v. Commissioner, 293 U.S. 560 15n.
McFeely v. Commissioner, 296 U.S. 102 15
Maass v. Higgins, decided March 3, 1941 10
Maguire v. Commissioner, decided March 31, 1941 6, 13, 14, 15, 16
Morgan v. Commissioner, 309 U.S. 78 12
Neuberger v. Commissioner, 311 U.S. 83 9
Pringle v. Commissioner, 64 F. (2d) 863 (C.C.A. 9th, 1933), certiorari denied, 290 U.S. 656 15n.
Saltonstall v. Saltonstall, 276 U.S. 260 14, 20, 21
Schechter Poultry Corp. v. United States, 295 U.S. 495 19
Taft v. Helvering, 311 U.S. 195 9, 11
Twining v. Commissioner, 299 U.S. 578 15n.
Van Vranken v. Helvering, 115 F. (2d) 709 3, 11, 12, 22, 25
Warner v. Commissioner, 293 U.S. 620 15n.

Page

Statutes:

Revenue Act of 1926, § 302(c) 11
Revenue Act of 1928, § 113(a)(5) 13
Revenue Act of 1932, § 113(a)(5) 13
Revenue Act of 1934, § 113(a)(5) 2, 3, 11, 12, 13, 21
§ 117(a) 24
§ 117(d) 24

Miscellaneous:

G.C.M. 10260, XI-1 Cum. Bull. 79 6, 15
Regulations 37 (1919 ed.) Art. 12 8
Regulations 37 (1921 ed.) Art. 12 8n.
Regulations 63 (1922 ed.) Art. 11 8n.
Regulations 68 (1924 ed.) Art. 11 8n.
Regulations 70 (1926 ed.) Art. 11 8n.
Regulations 70 (1929 ed.) Art. 11 8n.
Regulations 80 (1934 ed.) Art. 10 8
Regulations 80 (1937 ed.) Art. 11 10
Regulations 80 (1937 ed.) Art. 13 8
Regulations 86, Art. 22(b)(1)-1 10n.
Art. 23(o)-1 9
Art. 113(a)(5)-1 6, 8, 9, 10
Art. 117-5 9
Pound, "Spurious Interpretation," 7 Col. L. Rev. 379 19n.

BLANK PAGE

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 684.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

RICHARD J. REYNOLDS.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF AMICI CURIAE.

This brief is filed by counsel who represent the petitioner in the case of *Augustus* v. *Helvering*, No. 819, now pending before this Court on a petition for a writ of certiorari. The brief is presented with the consent of counsel on both sides, which consent has been filed with the Clerk of this Court.

Question Presented.

The respondent's father died on July 19, 1918, and left him a contingent remainder in a trust. On April 4, 1934, the respondent became entitled to certain securities which he

then received from the trust. The question is whether the respondent "acquired" the securities when he became entitled to them in 1934, or on the death of his father in 1918, within the meaning of § 113(a)(5) of the Revenue Act of 1934.

Statute Involved.

The statute directly involved in this case is § 113(a)(5) of the Revenue Act of 1934. It reads as follows:

> If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition.

Provisions of earlier Acts and Bills which are material in establishing the proper construction of this section are included in the brief for the respondent in *Helvering* v. *Reynolds*, No. 684.

Argument.

I.

Section 113(a)(5) and its Legislative and Judicial History.

The statute involved in this case is § 113(a)(5) of the Revenue Act of 1934. It has been set out above. The sole question before the Court is the proper construction of the words "acquired" and "time of such acquisition" in this section.

The Government's position is that these words have the same meaning as if Congress had said "at the date of the death of the decedent." We contend that the words actually used by Congress cannot fairly and properly be given

this construction. Our position is supported by the decision of the court below, 114 F. (2d) 804, and is substantially supported by the opinion of the Second Circuit Court of Appeals in *Van Vranken* v. *Helvering*, 115 F. (2d) 709, where the court intimated that it would have accepted the construction for which we contend but for this Court's opinion in the case of *Helvering* v. *Hallock*, 309 U.S. 106.

The legislative and judicial history of § 113(a)(5) is rather extensive. It is presented in full in the brief for the respondent in this case. The presentation there was prepared in collaboration with counsel on the present brief, and it will not be repeated here. The steps through this material are somewhat detailed, but the path is not arduous, and if it is carefully followed, the result, we submit, is clear.

The conclusion from the historical material may be put in a sort of chronological form. The statutory words in question were first used by Congress in 1921, and continued without change until 1928. In the Revenue Acts of 1928 and 1932, a different formulation was adopted; but the original language was re-established in the Revenue Act of 1934. The materials available at the time the words in question were put back into the statute in 1934 lead surely to the conclusion that the words "acquired" and "at the time of such acquisition" did not refer, in all cases, regardless of the circumstances, to the date of the death of the original testator. If Congress had meant that conclusion, it would have used the words "at the date of the death of the decedent." On the contrary, it deliberately excluded those words from the statute in 1928, and did not put them into the statute in 1934. Moreover, the administrative and judicial construction of the words which Congress did use in 1934 was long continued and unbrokenly consistent at the time that Congress used them.[1]

[1] In their brief in the Circuit Court of Appeals in *Augustus* v. *Helvering* counsel for the Commissioner frankly conceded the

All the ordinary elements of construction point plainly to the conclusion that the words which Congress used did not mean "at the date of the death of the decedent." The only factor which could be suggested to point the other way is the Committee Report at the time of the adoption of the 1934 Act. But, as the court below held, and as we have developed in the material presented in the Reynolds brief, this Committee Report was dealing only with vested or unconditional interests and was not intended to relate to conditional interests of the sort involved in the present case. The Committee Report does not disclose any Congressional intention as to the treatment of conditional interests, and thus has no bearing on the question here.

Even if the Committee Report did deal with the present problem, its efficacy would raise a question of real moment. Committee Reports have their important function, of course. But, after all, Congress does not legislate by Committee Reports. On the contrary, Committee Reports are only relevant as they shed light on an ambiguous statute; a Committee Report cannot be relied on to import into a statute an ambiguity which is not there. Even if the Committee Report involved here was clear, specific, and unambiguous, it should furnish no basis, therefore, for changing the meaning of the words which Congress actually used in the statute itself; for the words which Congress actually used can hardly be said to be ambiguous in the light of the settled administrative and judicial construction at the time that

---

judicial construction. They said (p. 25): "In so far as the judicial construction of the statute is concerned, we concede that in construing Section 202(a)(3) of the Revenue Act of 1921 and Section 204(a)(5) of the Revenue Acts of 1924 and 1926 the Board and the courts had held (prior to the enactment of the Revenue Act of 1934) that whether property was acquired by the remainderman at the time of the testator's death or subsequently depends upon whether or not his remainder was vested or contingent at that time, and that a contingent remainderman does not then acquire the property."

Congress re-established them. The rule stated in *Helvering v. City Bank Farmers Trust Co.,* 296 U.S. 85, 89 (1935), seems squarely applicable here:

> "We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used."

Here, if the Committee Reports are disregarded, it would seem clear that "there can be no doubt of the meaning of the words used," in the light of the uniform departmental and judicial construction. Congress cannot use "white" in a statute and make it mean "black" by saying so in a Committee Report. And this is *a fortiori* true where, as here, the Committee Reports contain nothing which deal in any way specifically with an uncertain and conditional interest such as that here involved, so as to show any intention that the statutory words should mean anything different from what they had uniformly been construed to mean in the earlier Acts.

II.

The Effect of Events Subsequent to the Re-enactment of the Statute.

From this point on, we shall assume that the Court agrees that the proper construction of the statute in the light of the materials available at the time of its enactment did not make it mean the same as if it had read "at the date of the death of the decedent." These were words which Congress did not enact, and which Congress once specifically refused to enact. If the Court accepts our contention as to the fair and proper construction of the statute on the basis of the materials available at the time it was enacted, then it be-

comes necessary to consider the possible effect of events which occurred after the statute was passed. There are three items of this sort: (A) The regulation issued under the re-enacted statute; (B) this Court's decision in *Helvering* v. *Hallock,* 309 U.S. 106; and (C) the recent decisions in the *Maguire, Gambrill,* and *Campbell* cases, decided March 31, 1941. We shall turn to these in the following portion of this brief.

A. Article 113(a)(5)-1 of Regulations 86.

Some time after the pre-1928 statutory language was re-established in 1934, the Treasury issued a sweeping regulation, which appears as Article 113(a)(5)-1 of Regulations 86. This regulation, if valid, supports the Commissioner in the present case. We submit that it is not valid.

The statutory language in question was first enacted in 1921. No such regulation was issued at any time before 1935. On the contrary, as has been shown in the discussion of administrative and judicial history, the position of the Treasury was clear and continuous to the contrary, and was plainly expressed as late as 1932 in G.C.M. 10260, XI-1 Cum. Bull. 79, 80, and more than two years after this Court's decision in *Brewster* v. *Gage,* 280 U.S. 327. In *Augustus* v. *Helvering,* 118 F. (2d) 38, 43, the court referred to Article 113(a)(5) of Regulations 86 as "The first administrative interpretation" of the statute and said that such an interpretation "often expresses the general understanding of the times or the actual understanding of those who played an important part when the statute was drafted." This statement, it seems to us, is obviously inapplicable here. This regulation was not a contemporaneous regulation. It was not issued until nearly fourteen years after Congress had first used the language in question, during which time

the Treasury had consistently given the language a wholly different construction.

Nor is there any basis here for any argument on the ground of re-enactment after the issuance of the regulation in 1935. The regulation was clearly a change in the Treasury construction of words which Congress had used for many years. Moreover, the tax year involved here is 1934 and the regulation was not issued until 1935.

The situation thus is the same as that before the Court in *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110. In that case there was a regulation followed by a re-enactment, then a change in the regulation followed by further re-enactment. This Court squarely rejected the argument that the later re-enactment amounted to a retroactive adoption of the changed regulation. It held instead that the earlier construction of the statute had become so firmly embedded in the law that it could not be changed by mere administrative action.

That, we submit, is the situation here. The words in question had been used in the statute for fourteen years at the time this regulation was issued. As we have tried to show in our discussion of the legislative, administrative, and judicial history, they had acquired a clear and settled meaning by the time they were re-established in the Revenue Act of 1934. And, apart from the effect of the prior long-continued construction of the statute to the contrary, this regulation should not stand here, for it was plainly modelled and based upon the Committee Report which has been discussed in detail in the brief for the respondent in this case. We have endeavored to show that the Committee Report does not properly bear the construction which the Government undertakes to put upon it, and that Congress cannot change the law by Committee Report. The regulation should have no higher standing than the Committee Report, and if the Committee Report falls, the regulation should fall with it.

The regulation in this case is inconsistent with another regulation of the Commissioner in a closely related field. In Article 113(a)(5)-1 of Regulations 86 the Commissioner has undertaken to say that property ultimately received by a remainderman is "acquired" at the death of the decedent no matter how contingent or uncertain the gift to the remainderman may be. Yet in Article 10 of Regulations 80 (1934 ed.), in effect at the time Regulations 86 was promulgated (and still in effect as Article 13 of Regulations 80 (1937 ed.)), it is provided that in computing the gross estate of a decedent for estate tax purposes—

> "Nothing should be included, however, on account of a contingent remainder in case the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. Nor should anything be included on account of an interest or an estate limited for the life of the decedent."

This regulation is of long standing. It first appeared in 1919 (Regulations 37 (1919 ed.), Art. 12), and has been continued without change in every subsequent edition of the estate tax regulations.[2]

This estate tax regulation is a natural and a proper one. If a man does not have anything at his death which is his to pass on to those who survive him, nothing should be included in his estate for tax purposes. The regulation applies both to contingent interests and vested interests subject to divestment upon the decedent's death—for such interests plainly come within the second sentence of the regulation quoted above. As long as either a condition precedent or a condition subsequent is outstanding, the dece-

[2] In addition to the two editions of Regulations 80 referred to above, see Regulations 37 (1921 ed.), Art. 12; Regulations 63 (1922 ed.), Art. 11; Regulations 68 (1924 ed.), Art. 11; Regulations 70 (1926 ed.), Art. 11; Regulations 70 (1929 ed.), Art. 11.

dent has not acquired or obtained anything that is his, that can be passed on to his beneficiaries. It would seem to be equally true that an interest subject to such conditions should not be regarded as "acquired" for income tax purposes. The fact that the Commissioner's regulation as to the income tax is inconsistent with his regulation dealing with the same problem in the estate tax field shows the artificiality and unsoundness of the income tax regulation.

It is not without significance that Article 113(a)(5)-1 of Regulations 86 was promulgated on February 11, 1935, at a time when the Treasury was undertaking to make rather extensive changes in the tax laws which had not been made by Congress. A very considerable number of regulations made during this period have already been held invalid as going beyond the proper field of administrative regulations. For example, in *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, this Court held invalid a regulation made on May 3, 1934, which was inconsistent with the prior long-continued Treasury practice. Another instance is found in *Helvering* v. *Wood*, 309 U.S. 344, where this Court refused to apply one of the articles of the same Regulations 86 involved in this case, holding that it went beyond the language of the statute. Several administrative constructions made at about that time have been held invalid by this Court at the present term. Thus, in *Neuberger* v. *Commissioner*, 311 U.S. 83, this Court refused to follow administrative rulings made in the spring of 1935. In *Helvering* v. *Janney*, 311 U.S. 189, this Court held invalid Article 117-5 of Regulations 86, saying that the law as it was enacted "was subject to change only by Congress, and not by the Department." Similarly, in *Taft* v. *Helvering*, 311 U.S. 195, Article 23(o)-1 of Regulations 86 was held to be "ineffective to deprive" the taxpayers of the right conferred on them by "the Revenue Act of 1934, taken with the meaning we think it had when enacted." Still another provision of Regulations 86

was held invalid in *Helvering* v. *Oregon Mutual Life Insurance Co.,* 311 U.S. 267, where this Court held that Congress by the statute had "granted life insurance companies a deduction for disability reserves which only Congress can take away." Finally, in *Maass* v. *Higgins,* decided March 3, 1941, this Court held that Article 11 of Regulations 80, promulgated in 1937, was not warranted by the statute enacted by Congress.[3]

These illustrations are sufficient to show that the period around 1935 was not a time when the Treasury confined its regulations exclusively to administration. We recognize, of course, that the line between administration and legislation is far from clear, and that considerable freedom must be given to administrative authorities in construing novel provisions of law. But there comes a time when administrative activity is perhaps too ambitious, when there is too great a tendency on the part of the Treasury to make extensive changes in the law through administrative regulations, when those changes should, in a proper allocation of the powers of Government, have come from Congress. We do not contend, of course, that all new provisions in Regulations 86 are invalid. We have shown, though, that many of the provisions of Regulations 86 went too far, and we submit that Article 113(a)(5)-1 of Regulations 86 falls into this category. This was not a regulation about a novel provision in the law. The statutory language in question had been first used by Congress fourteen years before, and it had received a uniform and long-continued administrative construction, and a uniform judicial construction at the time

---

[3] Similar results have been reached in the lower courts. Thus, in *Commissioner* v. *Winslow,* 113 F. (2d) 418, the First Circuit held that Article 22(b)(1)-1 of Regulations 86, relating to the income taxation of life insurance proceeds paid in installments, "is contrary to the expressed intention of Congress and is invalid." The Second Circuit reached the same result in *Commissioner* v. *Bartlett,* 113 F. (2d) 766.

Congress re-established the language in 1934. In the words of this Court in the *Taft* case, this regulation should be "ineffective to deprive" the petitioner of the basis provision established by "the Revenue Act of 1934, taken with the meaning we think it had when enacted." The statutory language in question had by 1934 acquired a meaning, in the language of the *Janney* case, which "was subject to change only by Congress, and not by the Department."

We submit, therefore, that the regulation does not support the Government's case. It is obviously based upon a misconstruction and a misconception of the Committee Report, and therefore should be given no weight beyond that accorded to the Report itself. In so far as it goes beyond the statute, it undertakes to change the meaning of words which had had a long history in the Revenue Acts; it thus attempts too much of legislation and should be held invalid.

B. The Hallock Case.

On January 29, 1940, this Court decided *Helvering* v. *Hallock,* 309 U.S. 106. This case involved the construction of § 302(c) of the Revenue Act of 1926, dealing with the estate tax on transfers intended to take effect in possession or enjoyment at or after death. That question obviously has no direct relation to the one involved here. The *Hallock* case was, however, regarded by the Second Circuit in *Van Vranken* v. *Helvering,* 115 F. (2d) 709, as sufficient reason for reaching a construction of § 113(a)(5) contrary to that which it would have reached if the *Hallock* case had not been decided. It thus becomes necessary to give careful attention to the *Hallock* case and to its proper effect upon the case at bar.

What the *Hallock* case did decide, in the language of the court in the *Van Vranken* case, 115 F. (2d) at 710, was that in the construction of tax statutes "the whole distinction

of the common law between vested and contingent remainders was irrelevant." This was an important, and we believe sound, development. We see no reason to disagree with the conclusion of the Second Circuit that the distinction between vested and contingent remainders "is as little appropriate to § 113(a)(5) as to § 302(c) of the Estate Tax." 115 F. (2d) at 711. The error of the court in the *Van Vranken* case, we believe, was in failing to see that eliminating the distinction between technically vested and contingent interests in the construction of § 113(a)(5) does not mean that all interests are "acquired" at the date of death of the donor regardless of their nature.

The *Hallock* case seems to free us from the technicalities of the distinction between vested and contingent remainders in the construction of tax statutes. It still remains necessary to construe the statute, and specifically, in this case, to determine the proper meaning of the word "acquire." This important part of the problem was largely overlooked by the court in the *Van Vranken* case. On that issue the *Hallock* case would seem to be authority for the contrary conclusion and to establish that the interest of the respondent here was not "acquired" until 1934.

In the light of the *Hallock* case, therefore, the question in this case is to be determined without regard to the technicalities of the distinction between vested and contingent remainders or with variations of state law as to the label which is applied to the beneficiary's interest. Cf. *Burnet* v. *Harmel,* 287 U.S. 103; *Morgan* v. *Commissioner,* 309 U.S. 78. It does not matter whether a particular interest is contingent, or vested but subject to be divested on the same contingency. In either case the interest is conditional and should be subject to the same application of the statute. In the present case it has been determined that the interest of the respondent was a contingent remainder, and this Court has declined to review that decision. It is thus estab-

lished that the respondent's interest was conditional, and was not indefeasibly his until the property was delivered to him in 1934.

C. The Maguire, Gambrill, and Campbell Decisions.

On March 31, 1941, this Court decided the cases of *Maguire* v. *Commissioner, Helvering* v. *Gambrill,* and *Helvering* v. *Campbell,* Nos. 346, 472, and 473-475. These cases involved primarily the construction of the words "at the time of the distribution to the taxpayer" in § 113(a)(5) of the Revenue Acts of 1928 and 1932. These words do not appear in § 113(a)(5) of the Revenue Act of 1934 which is before the Court in this case. It is true that the Court in the *Maguire, Gambrill,* and *Campbell* opinions used some rather broad language in dealing with the question there decided. But there is nothing more thoroughly established in the tradition of our law than that the decision of a court applies only to the facts and issues then before it, and that no question is decided until the materials bearing on it have been fully presented to the court and considered by it.

Apart from the differences in the terms of the statutes involved, there is one major differentiation between the question which is now before the Court and that which has been recently decided. In the *Maguire* and related cases there was no significant pattern of legislative, administrative, and judicial history. This Court pointed out in footnote 12 of the *Maguire* opinion that the administrative construction was conflicting, and early in its conflict. Here the administrative construction was unbrokenly consistent for fourteen years, and until after Congress re-established the words in question in the statute in 1934. In the *Maguire* and related cases there was no judicial history at all. With respect to the present problem, the Government has conceded that the courts had uniformly reached a construction favorable to

the respondent's case prior to the enactment of the Revenue Act of 1934. In the *Maguire* and related cases the Court was dealing with an open question. Here the Court is called upon to construe language used by Congress against the background of an elaborate pattern of history which was wholly lacking (and almost entirely not before the Court) in the decisions reached last month.

There is another distinction of importance. The word before the Court in the present case is "acquired." That word has already been construed by this Court, directly in *Helvering* v. *San Joaquin Fruit & Investment Co.,* 297 U.S. 496, and indirectly in *Saltonstall* v. *Saltonstall,* 276 U.S. 260. The bearing of these cases on the present problem is developed in the following Point in this brief (*infra,* pp. 19-25). Neither of these cases is even cited, much less considered, in any of the *Maguire, Gambrill,* or *Campbell* opinions. It cannot be assumed that this Court intended to overrule a case which is so plainly right as the *San Joaquin* decision. It cannot be assumed that this Court will fail to follow the approach so clearly indicated by that case when it is directly involved in the present case.

The Government has filed a motion to reverse in the present case, evidently from a desire to foreclose full consideration of the question here. In this motion to reverse there is no mention of the pattern of legislative, administrative, and judicial history in which the question under the 1934 Act is enmeshed. There is no reference to this Court's decision in the *San Joaquin Fruit & Investment* case or in *Saltonstall* v. *Saltonstall.* Apparently the Government would prefer to have the present case disposed of without consideration of this material.

In its motion to reverse, the Government relies specifically on the decision in the *Gambrill* case that, for the purpose of applying the capital gains provision of the Revenue Act of 1928, property was "held" by a remainderman from the

time of the death of the decedent. Here again we have a different word, serving a different function, and in a wholly different historical setting. Moreover, the decision in the *Gambrill* case was in terms rested upon this Court's decision in *McFeely* v. *Commissioner*, 296 U.S. 102. It should hardly be overlooked that the *McFeely* case itself was based in part on "the rule . . . that a taxing statute . . . should be construed favorably to the taxpayer." 296 U.S. at 111. There is, to say the least, an element of irony in applying that case here.[4] Moreover, the *McFeely* case was founded squarely on this Court's decision in *Brewster* v. *Gage*, in 1930, which the Treasury itself did not regard as controlling the present question as late as 1932 and at the time the 1934 statute was enacted. G.C.M. 10260, XI-1 Cum. Bull. 79, 80 (1932).[5]

This Court's opinion in the *Maguire* case was likewise rested largely on *Brewster* v. *Gage*. This may have been proper as to the 1928 Act; but its application to the 1934 statute would ignore the long-continued administrative and judicial history which continued unbroken *after Brewster* v. *Gage* was decided in 1930, as well as before. Moreover, in the *Maguire* opinion the Court referred to *Brewster* v. *Gage* as involving an interest which "may not be unconditional." This ignores the fact that *Brewster* v. *Gage* itself was based

[4] The Government did not even cite the *McFeely* case in its brief in the court below, or in its petition here.

[5] Similarly, in *Pringle* v. *Commissioner*, 64 F. (2d) 86[illegible], 865 (C.C.A. 9th, 1933), the court said: "The cases of Brewster v. Gage, 280 U.S. 327, and Chandler v. Field, 63 F. (2d) 13, are not controlling here. In each of those cases the interest became vested immediately upon the death of the testator." This Court denied certiorari, 290 U.S. 656. Certiorari was also denied in five other similar cases in 1933, 1934, 1935, and 1936. *Corwin* v. *Lane*, 290 U.S. 644; *Hopkins* v. *Commissioner*, 293 U.S. 560; *Warner* v. *Commissioner*, 293 U.S. 620; *Beers* v. *Commissioner*, 296 U.S. 620; *Twining* v. *Commissioner*, 299 U.S. 578. In the *Pringle* and *Lane* cases the petitions which were denied were filed by the Government.

on long-continued administrative construction specifically dealing with the question there involved (see 280 U.S. at 336-337), and that the Court specifically relied in *Brewster* v. *Gage* on the fact that the taxpayer's interest "vested immediately upon testator's death." 280 U.S. at 334. *Brewster* v. *Gage* can be made an authority for the Government here only by reading into it precisely the contrary of the bases on which it was in fact decided, and then by attributing to the year 1934 thoughts that did not exist at that time, as evidenced among other things, by this Court's repeated denials of certiorari.

We would call the Court's attention to a final reason as to why the *Maguire* and related decisions should not be regarded as controlling here. The question involved in this case is one of statutory construction. The statute was enacted in 1934, and the words used were a re-enactment of words which had first been put into the statute in 1921. The construction of a statute, it is fair to suppose, should be based upon the materials which were in existence at the time the statute was enacted. What is sought is the meaning of the statute which Congress passed, and a decision of this Court nearly seven years later on a different provision of a different statute would ordinarily have little direct bearing on that question.

Though a certain amount of fluidity of construction is undoubtedly desirable in the field of constitutional law, this is not true as to the construction of statutes, apart from a few ancient ones which have really become a part of the common law, such as the statute of frauds. Certainly the statute involved here is not of that category. These statutory words were used continuously from 1921 to 1928 and were re-established in 1934. The meaning of words so used ought not to be regarded as changing years after the provision was passed, at least without further action by Congress. The statute in question ought to be construed

now as it would have been construed by this Court immediately after it was enacted in 1934. It seems difficult to doubt what construction would then have been reached in the light of the pattern of legislative, administrative, and judicial history. For it should not be forgotten that to construe this statute as if it said "at the date of the death of the decedent" will be to make it mean precisely what it would have meant if Congress had put into the statute the very words which it refused to enact.

It should not be overlooked either that it is now twenty years since these statutory words were first used; and the question of the construction of the statute would long ago have been passed upon by this Court if the Treasury had not for fourteen years consistently followed the construction for which we contend. The construction now reached should not be different from that which would have been reached at an earlier period. Apart from questions of the proper relation of courts and legislature, at least three reasons may be found for this conclusion: (1) To reach a different construction now from what would have been reached in 1934 will result in discrimination. Over a period of many years the cases of innumerable taxpayers have been adjusted on the basis of the construction for which we contend, in many cases after controversy and litigation. We should all live under the same law, except as Congress changes it. (2) Unless the construction of a statute such as this is regarded as a fairly static thing based upon factors knowable as of the time of the enactment of the statute, the problems of the administration of the tax laws will be greatly aggravated. Taxing officers will never feel free to adjust a case as they think it should be adjusted because they cannot foresee shifts in the approach of the courts many years hence. The result will be a substantial increase in the volume of administrative controversy with noticeable consequence on the effective working of our tax administration

system. And finally, (3) to construe the statute now differently than it would have been construed in 1934 is in substance to give the statute a wholly retroactive construction. If Congress passes an amendment to a taxing statute, the amendment is applicable only to the year in which it was passed and prospectively. Yet a decision of this Court different from what would have been reached in 1934 would in effect be a retroactive amendment of the statute,[6] and that would be obviously unfair and contrary to any intention which it is possible to attribute to Congress. If these evils are to be avoided, we submit that the Court should endeavor to construe the present statute as it would have been construed when it was enacted in 1934.

How the statute would have been construed in 1934 and shortly thereafter may be thought to be evidenced by the uniform decisions of the Circuit Courts of Appeals in eleven cases,[7] all after *Brewster* v. *Gage* was decided, and with certiorari denied by this Court *six* times, in every case in which it was applied for. To this may be added this Court's own decision in *Helvering* v. *San Joaquin Fruit & Investment Co.*, which is set out in the following Point of this brief.

The problem is to ascertain what Congress meant, not what it might have provided if it had given more adequate consideration to the varying fact situations which might arise under the enactment. It may well be that the statute as it stands is defectively drawn. It may well be that Congress would have passed a better statute if it had said "at the date of the death of the decedent." But it did not use those words; it specifically refused to use them. The power to construe statutes should not be treated (in the words of Mr. Justice Cardozo in *A. L. A. Schechter Poultry Corp.* v.

[6] Cf. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673; *Great Northern Railway Co.* v. *Sunburst Oil Refining Co.*, 287 U.S. 258.

[7] These are cited and discussed at pages 13-18 in the brief for the respondent in this case.

United States, 295 U.S. 495, 551) as "a roving commission to inquire into evils and upon discovery correct them." [8]

III.

The Property was Not Acquired by the Respondent until 1934.

This Court has already considered the meaning of the word "acquired" as used in this same section of the statute, and has given the word a construction in accordance with its usual and accepted meaning, free of any artificiality or strain. The question came before the Court in *Helvering* v. *San Joaquin Fruit & Investment Co.*, 297 U.S. 496, where the issue was, in the Court's words (297 U.S. at 496): "Is real property 'acquired,' within the meaning of the revenue acts, when a lease is made containing an option to purchase, or when the option is exercised?" The Court held that the property was not "acquired" until the option was exercised, and this, it may be said, seems an obviously sound conclusion. In reaching this result the Court used this significant language (p. 499):

> "But even if we should agree that a lessee-optionee acquires, by virtue of the instrument, an equitable interest in the land it would not follow that, within the contemplation of the revenue acts, he acquires the property at the date of the option rather than at the date of conveyance. The word 'acquired' is not a term of art in the law of property but one in common use. The plain import of the word is 'obtained as one's own.' Language used in tax statutes should be read in the ordinary and natural sense. In the common and usual

[8] *Cf.* Pound, "Spurious Interpretation" (1907), 7 Col. L. Rev. 379.

meaning of the term the land was acquired when conveyed to the respondent's predecessor."

This case seems to be of very great importance in the present situation. Of course, it arose upon different facts. All cases do. But the differences upon analysis do not appear to be substantial, and the approach of the Court, clearly expressed, seems directly applicable here. The language quoted above may be followed through sentence by sentence and phrase by phrase, and each statement will be found to fit the present case. Thus, it may be argued that the respondent here acquired some sort of an interest in the property in question on his father's death. It does not follow that he acquired the property. As the Court said, the word "acquired" is one "in common use," and "should be read in the ordinary and natural sense." Its "plain import" is "'obtained as one's own.'" "In the common and usual meaning of the term," the securities involved here were not acquired by the respondent while his interest remained conditional.

There is another decision of this Court which seems to us to shed considerable light upon the "ordinary and natural" meaning of the word "acquired." The case in question is *Saltonstall* v. *Saltonstall*, 276 U.S. 260, where this Court upheld a Massachusetts tax on property passing at death by reason of the failure to exercise a power of appointment. In reaching this result the Court said (p. 271):

> "The beneficiary's *acquisition* of the property is equally incomplete whether the power be reserved to the donor or another. And so the property passing to the beneficiaries here was *acquired* only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance." (Italics ours.)

It will be noted that in this passage the Court used both of the words which are material in § 113(a)(5), namely, "acquisition" and "acquired." The applicability of this decision to the construction of § 113(a)(5) is striking when it is considered in connection with the facts of *Augustus* v. *Helvering*, No. 819. There the interest of the beneficiary, among other infirmities, was subject to the life tenant's power to consume all of the property, and to the life tenant's power to appoint the property as she pleased. It would seem that this statement in *Saltonstall* v. *Saltonstall* is a clear indication of the "ordinary and natural" sense of the words of the statute as applied to such a situation.

It seems obvious that, within the ordinary usages of the English language, the respondent here did not "acquire" "the property" in question while he had only a contingent remainder. He did acquire some interest under his father's will, it is true. But the statute does not say that the basis of property shall be its value at the time some interest in the property is acquired. It says that the basis shall be the value at the time "the property" is acquired. In no "ordinary and natural" sense of the word can it be said that the petitioner here acquired "the property" until 1934.

To give the word "acquired" the construction for which the Commissioner contends would distort it beyond all recognition. It would mean that the respondent could have "acquired" property which never came to him. If the trustee had sold any of the shares in question, there can be no doubt that he would have taken the basis at the date of the testator's death on the ground that *he* then acquired the property. Yet the Commissioner's position is that the respondent here "acquired" the property at the same time. The Commissioner's construction might mean, in another case, that a person had "acquired" property many years before he was born—if the property ultimately came to a remainderman who was not living when the testator died. Such a

result, we submit, is not construction. *It could be reached only as a means of finding out what Congress might have said rather than what Congress actually did say in the statute before the Court.*

The artificiality of the construction is shown by the *Hallock* case itself. The decision there was that, since the death of the grantor did in substance free the grantee's interest from uncertainty, the transfer was one which "took effect" at the time of the grantor's death, regardless of the technical nature of the grantee's remainder interest. In the *Van Vranken* case the court properly brushed aside the technical distinction between vested and contingent remainders. But it then proceeded to treat all remainders as unconditional and conveying absolute ownership. This is squarely opposed to the decision in the *Hallock* case. If the court's conclusion were correct, there would have been no tax in the *Hallock* case, since the remainderman would have owned the property prior to the grantor's death, and the transfer could not have been held to have taken effect on that event.

The Commissioner's position is that property taken under a will is "acquired" in all cases at the date of the death of the decedent, regardless of the factual nature of the interest actually conferred by the will. If Congress had meant that the date of the death of the decedent should be used in all cases, it would have been very easy for Congress to use those words. We have already shown that Congress not only did not use those words, but once struck those very words out of the statute. But, quite apart from the whole matter of legislative history, to give the word "acquired" any such construction is to distort it in a way which would make a lexicographer shudder and the ordinary layman wonder at the ways of the law.

But, says the Commissioner, unless the word "acquired" is construed to mean "date of death of the decedent," there

will be a "gap," a period during which increase or decrease in the value of property may not be recognized for tax purposes. But the statutes as to basis are full of gaps. For example, increase in value of property from the date of purchase to the date of death of its owner is not now subjected to income tax, nor can decrease in value be deducted. There are numerous other examples which need not be repeated here. Whether or not there should be a gap is purely a matter of Congressional policy. When Congress could so easily have avoided the gap by using the words "date of death of the decedent," the fact that Congress did not use these words should not be tortured into a reason for construing the word "acquired" to have the meaning of the words which Congress refused to enact.

Indeed, there may have been very good reasons why Congress deliberately refrained from using the words "date of death of the decedent," which it knew how to use if it wanted to. We have no way of knowing all that went on within the Congressional Committees. The various statements and reports are formal documents, but it is well known that much of the actual drafting of statutes is done by legislative draftsmen outside of the Committees, and the Committees also conduct many of their deliberations in executive session. Thus, not all of the Committee's actions and reasons for their actions are recorded. There may have been good reasons why members of Congress entrusted with the formulation of this provision deliberately refrained from closing the "gap." The statute in question was enacted in 1934. That was not only after a period of sharply falling prices, but it was also at a time when Congress was severely restricting the deduction of capital losses in income tax returns. Congress may well have thought that, by putting the date of acquisition as late as possible, it would in general reduce deductions for capital losses. Thus, if a testator died in 1928, and the remainder fell in in 1934, the property

would ordinarily have a far lower basis if the 1934 valuation were to control. Congress may have concluded that at that period losses so eliminated would far exceed gains.

And this is not all. By the same Revenue Act of 1934, Congress in § 117(a) established a percentage basis upon which capital gain was to be taxed. Under this provision, gain on property held for not more than one year was taxed at 100%, and then the percentages were graduated down until only 30% of gain on property held for more than ten years was subject to tax. Thus, on the capital gain side, the later the property was acquired, the more the tax would be. For this reason, too, Congress may have deliberately desired to put the date of acquisition as late as possible. In this manner it tended in the ordinary case to push the basis low, and then to recognize as large a percentage as possible of the gain. It is true that this would have the effect of making a larger percentage of the loss recognizable as well. But this was not a serious matter from the tax point of view because, by § 117(d) of the Revenue Act of 1934, the net deduction for capital losses was limited to a maximum amount of $2000.

The question before the Court is not what would scientifically or abstractly be the best way to draft the statute. It is not how this Court thinks the statute should be drafted if it were being reformulated at the present time. The word that Congress did use was "acquired." It did not say "date of death of the decedent," and the word "acquired" cannot fairly be said to be the equivalent of that phrase under all facts and circumstances. This Court has authoritatively determined that the word "acquired" is to be read in its "ordinary and natural sense." *Helvering* v. *San Joaquin Fruit & Investment Co.*, 297 U.S. 496, 499. In the ordinary and natural sense of the word, it cannot be said, we submit, that the respondent acquired the property in question while his interest was so conditional and subject

to infirmities as was the case here or in the *Augustus* case, No. 819.

In the *Van Vranken* case the court put its conclusion on "an unanalyzed and intuitive conclusion from the text as a whole." 115 F. (2d) at 711. We recognize that the use of language is not subject to mathematical precision. We submit, however, that before recourse is had to intuition, it is better to see whether the words used by Congress do not have "an ordinary and natural sense." Such a sense may readily be found here, and it leads to a conclusion favorable to the respondent.

Conclusion.

The judgment below is correct and should be affirmed.

Respectfully submitted,

Orville Smith,
Erwin N. Griswold,
Amici Curiae.

April, 1941.

BLANK PAGE

p 2 dissent

SUPREME COURT OF THE UNITED STATES.

No. 684.—October Term, 1940.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Richard J. Reynolds.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 26, 1941.]

Mr. Justice ~~Douglas~~ delivered the opinion of the Court.

Respondent's father died in 1918, leaving him a remainder interest in a testamentary trust, an interest which the court below found to be contingent under North Carolina law. He received his share of the trust, including securities, from the trustee on April 4, 1934. Some of the securities so distributed had been received by the trustee from the decedent's estate and others had been purchased by the trustee between 1918 and 1934. During the year 1934 respondent sold some of the securities in each group. In computing his gains and losses he used as the basis the value on April 4, 1934, when he received the securities from the trustee. The Commissioner determined that the proper basis under the Revenue Act of 1934 (48 Stat. 680) was the value of the securities at the time of decedent's death in the case of those then held by decedent and their cost to the trustee in the case of those which the trustee had purchased. The Board of Tax Appeals sustained the Commissioner. 41 B. T. A. 59. The Circuit Court of Appeals reversed. 114 F. (2d) 804. We granted the petition for certiorari (exclusive of the question whether the remainder was vested or contingent under the law of North Carolina) because of a conflict among the circuits.[1]

Sec. 113(a)(5) of the 1934 Act provided: "If the property was acquired by bequest, devise, or inheritance, or by the decedent's

[1] Opposed to the decision below are Van Vranken v. Helvering, 115 F. (2d) 709; Cary v. Helvering, 116 F. (2d) 800; Archbold v. Helvering, 115 F. (2d) 1005—all from the Second Circuit; and Augustus v. Commissioner, 118 F. (2d) 38, from the Sixth Circuit.

estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition." The government places considerable stress on *Maguire* v. *Commissioner,* 312 U. S. —; *Helvering* v. *Gambrill,* 312 U. S. —; and *Helvering* v. *Campbell,* 312 U. S. —, decided under the 1928 and 1932 Acts, in support of its contention that as respects securities owned by decedent the proper basis was their value at his death even though respondent's interest was then contingent. And it also relies on Treasury Regulations 86, promulgated under the 1934 Act, Art. 113(a)(5)-1(b) of which provided that "all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise." Respondent on the other hand urges that the phrase "at the time of such acquisition" when it was included in the 1934 Act had acquired by construction a definite meaning which excluded contingent remainders and therefore that Congress must be presumed to have used those words in that sense. In that connection he points out that the phrase "at the time of such acquisition" had appeared in the 1921, 1924, and 1926 Acts[2] and that certain office decisions of the Treasury,[3] and certain decisions of the lower federal courts[4] under those acts, made prior to the enactment of the 1934 Act, had held that a beneficiary did not acquire property when his interest was merely contingent. Respondent emphasizes that the legislative history of the 1934 Act shows no mention of the prior administrative and judicial treatment of contingent remainders and makes no complaint with the practice of the bureau or with the decisions. He insists that the words "acquired" or "acquisition" are not vague or ambiguous words but mean to obtain "as one's own", as held in *Helvering* v. *San Joaquin Fruit & Investment Co.,* 297 U. S. 496, 499. By these arguments and related ones respondent seeks to demonstrate that the earlier rule had become embedded in the law so that it could

---

[2] Sec. 202(a)(3), Revenue Act of 1921 (42 Stat. 229); § 204(a)(5), Revenue Act of 1924 (43 Stat. 258); § 204(a)(5), Revenue Act of 1926 (44 Stat. 14).

[3] O. D. 727, 3 Cum. Bull. 53 (1920); G. C. M. 10260, XI-1 Cum. Bull. 79, 80 (1932).

[4] See, for example, Pringle *v.* Commissioner, 64 F. (2d) 863; Hopkins *v.* Commissioner, 69 F. (2d) 11. Cf. Lane *v.* Corwin, 63 F. (2d) 767.

be changed not by administrative rules or regulations but by Congress alone. On the basis of such reasoning and the difference in wording between the 1934 Act and the 1928 and 1932 Acts, he seeks to distinguish the *Maguire, Gambrill,* and *Campbell* cases. And since Art. 113(a)(5)-1(b) was promulgated on February 11, 1935, respondent insists that to make it applicable to transactions occurring in 1934 would be to give it a retroactive effect contrary to *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U. S. 110.

Respondent's position is not tenable. We are not dealing here with a situation where the meaning of statutory language is resolved by reference to explicit statements of Congressional purpose. *Maguire* v. *Commissioner, supra; Helvering* v. *Campbell, supra.* Here the Committee Reports[5] on the 1934 Act are wholly silent as to whether a taxpayer has acquired property within the meaning of § 113(a)(5) at a time when he has obtained only a contingent remainder interest. And we need not stop to inquire whether, in absence of the Treasury Regulations under the 1934 Act, the administrative construction of "acquisition" under the earlier Acts was of such a character (*Higgins* v. *Commissioner,* 312 U. S. 212) and the prior judicial decisions had such consistency and uniformity that Congressional reenactment of the language in question was an adoption of its previous interpretation within the rule of such cases as *United States* v. *Dakota-Montana Oil Co.,* 288 U. S. 459. That rule is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change. *Morrissey* v. *Commissioner,* 296 U. S. 344, 355. And see *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299. It gives way before changes in the prior rule or practice through exercise by the administrative agency of its continuing rule-making power. *Helvering* v. *Wilshire Oil Co.,* 308 U. S. 90, 100-101. Nor is Art. 113(a)(5)-1(b) of the Regulations condemned by *Helvering* v. *R. J. Reynolds Tobacco Co., supra.* That case turned on its own special facts. The transactions there in question took place at a time when a regulation was in force which expressly negatived any tax liability. The regulation remained outstanding for a long time and was followed by

[5] H. Rep. No. 704, 73d Cong., 2d Sess., pp. 27-28; S. Rep. No. 558, 73d Cong., 2d Sess., pp. 34-35.

several reenactments of the statute. About five years after the transactions in question took place the prior regulation was amended so as to impose a tax liability. There are no such circumstances here. No relevant regulation was in force at the time respondent sold the securities in 1934. The regulation here in question was promulgated under the very Act which determines respondent's liability. The fact that the regulation was not promulgated until after the transactions in question had been consummated is immaterial. Cf. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129. The magnitude of the task of preparing regulations under a new act may well occasion some delay. To hold that respondent had a vested interest in a hypothetical decision in his favor prior to the advent of the regulations would introduce into the scheme of the Revenue Acts refined notions of statutory construction which would, to say the least, impair an important administrative responsibility in the tax collecting process.

Hence the regulation governs this case if the word "acquisition" as used in § 113(a)(5) was susceptible of this administrative interpretation. We think it was. However unambiguous that word might be as respects other transactions (*Helvering* v. *San Joaquin Fruit & Investment Co., supra*) its meaning in this statutory setting was far from clear as respects property passing by bequest, devise, or inheritance. The definition of "acquisition" contained in the regulation is not a strained or artificial one. Admittedly the date of death would be the proper basis if respondent's interest under the testamentary trust had been a vested remainder. But even a vested remainderman does not have all of the attributes of ownership. So the test in this type of case is not whether respondent had full enjoyment of the property prior to the delivery of the securities to him but whether he earlier had acquired an interest which ultimately ripened into complete ownership. Respondent has become the taxpayer because he has obtained full ownership of the property and has sold it. The tax is on gains, if any, realized by him in that transaction. Hence, as we indicated in the *Maguire* and *Campbell* cases, to carry into that computation the value of the property at the time the taxpayer had only a contingent remainder interest in it is not to tax him on values which he never received. The statute as thus interpreted "merely provides a rule of thumb in alleviation of a tax which would be com-

puted by reference to the entire amount of the original inheritance were it to be based on cost to the taxpayer." *Helvering* v. *Campbell, supra,* p. —. As stated by Judge Arant in *Augustus* v. *Commissioner,* 118 F. (2d) 38, 43, the regulation was an "apt interpretation to make this part of the statute fit efficiently and consistently into the scheme of the revenue system as a whole." See *Maguire* v. *Commissioner, supra.*

Respondent's suggestion that the regulation does not cover this case will not stand analysis. It has a broad sweep and embraces all interests which have their origin in a bequest, devise, or inheritance.

For the reasons stated, the proper basis as to the securities owned by the decedent was their value at his death.

There remains the question as to the proper basis for securities purchased by the trustee. In the *Maguire* case we held that "cost" was the proper basis as provided in § 113(a) of the 1928 Act since securities purchased by a trustee were not "acquired . . . . by will" within the meaning of § 113(a)(5) of that Act. While § 113(a)(5) of the 1934 Act substitutes "acquired by bequest, devise, or inheritance" for "acquired either by will or intestacy" in the 1928 Act, that change does not call for a result different from that reached in the *Maguire* case. For the reasons there stated, we hold that as respects securities purchased by the trustee the proper basis is the cost to him. That makes it unnecessary to examine the validity of the holding of the court below that Art. 113(a)(5)-1(d) of the Regulations[6] is inapplicable because decedent did not die before March 1, 1913.

Reversed.

---

[6] "*Property acquired before March 1, 1913; reinvestments by fiduciary.*—If the decedent died before March 1, 1913, the fair market value on that date is taken in lieu of the fair market value on the date of death, but only to the same extent and for the same purposes as the fair market value on March 1, 1913, is taken under section 113(a)(14).

"If the property is an investment by the fiduciary under a will (as, for example, in the case of a sale by a fiduciary under a will of property transmitted from the decedent, and the reinvestment of the proceeds), the cost or other basis to the fiduciary is taken in lieu of the fair market value at the time when the decedent died."

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

No. 684.—October Term, 1940.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Richard J. Reynolds.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 26, 1941.]

Mr. Justice Roberts.

I disagreed with the decisions of the Court in *Maguire v. Commissioner,* No. 346, *Helvering* v. *Van Nest,* No. 472, and *Helvering* v. *Campbell, et al.,* Nos. 473, 474, and 475, of this term, construing the meaning of the phrase "time of distribution to the taxpayer", as used in § 113a(5) of the Revenue Acts of 1928 and 1932. My dissent was bottomed upon the view that to construe that phrase as meaning the time of the distribution to a trustee, in a case where the taxpayer could neither receive nor enjoy the property, was to disregard the unambiguous words of the statute. I recognize the binding force of those decisions but think that the Court's disposition of the present cases constitutes an even looser and less admissible construction, amounting, in effect, to legislation.

In all the revenue acts from that of 1921 to that of 1926, inclusive, the cognate provision was that if the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis should be the fair market value of such property at the time of such acquisition. In the revenue act of 1928 a new provision was substituted making the basis in the case of a general or a specific devise or of intestacy the fair market value at the time of the death of the decedent. The same basis was provided if property was acquired by the decedent's estate from the decedent. In all other cases, if the property was acquired by will or by intestacy, the basis was made value at the time of the distribution to the taxpayer. The language was retained in the Act of 1932. In the revenue act of 1934, § 113a(5)

was again cast in the exact language in which the cognate sections had appeared in all the acts prior to that of 1928.

The meaning of the provision is plain. What Congress was dealing with was the "property". It did not specify a right inchoate or otherwise, or an interest less than ownership, but used

term

the colloquial ~~phrase~~ "property". And Congress employed a word in common and ordinary use and not a technical ~~phrase~~ of convey-

expression

ancers when it spoke of the time of "acquisition" of the property. Anyone reading the ~~phrase~~ would be justified in concluding that

sentence

if he sold property which came to him from a decedent's estate he must take as his basis of value the market value as of the date when he became the owner of the property; when he became able to enjoy it and dispose of it at his will.

The present decision finds that Congress did not intend any such thing; that, on the contrary, by a circumlocution, it meant that the taxpayer must take as his basis the fair value at the date of the decedent's death if his ultimate acquisition of the property is traceable to a decedent's will. Thus, though he had no use or benefit of the property, could not dispose of it, and might never enjoy it, he is to be treated as having acquired it.

A contrary conclusion is required by *Helvering* v. *San Joaquin Fruit & Investment Co.*, 297 U. S. 496. There the Court, in applying the same section here involved, held that the term "acquired" was not a word of art; and though the acquisition had its origin in an option which the taxpayer exercised, as here the acquisition had its origin in a will, agreed with the Government's contention that the time of full enjoyment as one's own is the date of acquisition, not the time of obtaining some inchoate interest which may or may not ripen into ownership.

But if there were doubt as to the meaning of Congress, the legislative history should preclude the strained construction now adopted. In the *Maguire* and related cases administrative construction and legislative history were meagre and inconclusive. Here violence must be done to a substantial volume of such aids to construction to reach the announced result.

In 1920 the Treasury ruled that

"Where in a bequest of property the remaindermen have only a contingent interest prior to the death of the life tenant, the basis for determining gain or loss from a sale of such property

by the remaindermen is its value as of the date of death of the life tenant."[1]

There is no dispute that between 1920 and 1935 the Treasury uniformly so interpreted the statutory provision now otherwise construed. In 1930 this Court held that in the case of a residuary legatee whose property rights attached at the moment of death, and who was in contemplation of law and in fact the owner of the property bequeathed to him from the date of death, the time of acquisition was the date of death.[2] The decision obviously did not touch a situation such as that disclosed in the present cases and the Treasury so understood. In 1932 the General Counsel of the Bureau of Internal Revenue rendered an exhaustive opinion in which he referred to, and analyzed, our decision and summarized the administrative practice by saying:

> " . . . the position of this office has been that one who has a mere contingent interest does not 'acquire' the property in question until his interest becomes vested. (O. D. 727, C. B. 3, 53; S. M. 4640, C. B. V-1, 60.) See also I. T. 1622, C. B. II-1, 135; S. O. 35, C. B. 3, 50."

The judicial construction was uniform to the same effect.[3]

That the Treasury thought the distinction between the acquisition date of vested and contingent interests improper is attested by the fact that in its briefs on applications for certiorari in several of the cases cited in Note 4 it so stated; and in the *Pringle* case it strenuously contended for a reversal of the judgment on that ground. In its brief in support of its petition for certiorari in the *San Joaquin* case, *supra*, which arose under the very section now in question, the Government said: "It is quite generally recognized that the holder of a contingent estate in property does not acquire the same within the meaning of the revenue acts until the estate becomes vested." (Citing several of the cases found in the note.) Of course that statement supported the position of the Government in that case. But a new view has apparently emerged, which better serves the Government's interest here.

---

1 O. D. 727, 3 C. B. 53.

2 Brewster *v.* Gage, 280 U. S. 327.

3 Lane *v.* Corwin, 63 F. (2d) 767; Pringle *v.* Commissioner, 64 F. (2d) 863; Hopkins *v.* Commissioner, 69 F. (2d) 11; Becker *v.* Anchor Realty and Investment Co., 3 F. Supp. 22, aff'd 71 F. (2d) 355; Warner *v.* Commissioner, 72 F. (2d) 225; Beers *v.* Commissioner, 78 F. (2d) 447.

It seems plain that when, in 1934, Congress decided to re-adopt the language used in the revenue acts from 1921 to 1926, inclusive, it should be taken as having adopted it not only with a sense of its plain meaning but with a recognition of its uniform interpretation. We are not left, however, without light shed by the legislative history and that history furnishes confirmation of the view that Congress did not intend to give any strained, extraordinary, or unusual meaning to its language or to disregard its accepted significance.

The revenue acts have always treated estates as taxpayers for purposes of income tax. From the adoption of the revenue act of 1918 the Treasury Regulations uniformly provided that if an executor sold estate property he must take as a basis the value of the property at the time of the decedent's death for calculating taxable gain.[4] The Treasury treated the estate's time of acquisition as the date of the decedent's death within the meaning of the sections of the revenue acts from 1921 to 1926. In 1926 the Court of Claims held that when Congress used the terms "acquired" and "acquisition" it meant that the executor might take, as the basis date, the date of acquisition by the decedent.[5] This decision upset the uniform practice of the Treasury and required an amendment of the regulations to conform to it. Congress was confronted with this situation when it came to pass the revenue act of 1928. The history of what happened in this respect is most enlightening. The Joint Committee on Internal Revenue, in its report,[6] referred to the difficulty created by the *McKinney* decision, and the doubt the decision had thrown on the meaning of acquision, and stated, with respect to the proposed section: "The 'date of death' is recommended to make the basis certain and definite." The Ways and Means Committee also rendered a report to accompany that of the Joint Committee. In this it said:[7] "It is believed that the basis should be the value of the property on the date of the decedent's death, and this rule is incorporated in section 113(a)(5)." It con-

[4] See Hartley *v.* Commissioner, 295 U. S. 216, 220.

[5] McKinney *v.* United States, 62 Court of Claims, 180.

[6] House Document No. 139, 70th Cong., 1st Sess., pp. 17-18.

[7] H. R. No. 2, 70th Cong., 1st Sess., p. 18.

tinued: "It is also provided, in the same paragraph, that the basis *in case of a sale by a beneficiary shall be the value of the property on the date of the decedent's death.*" (Italics supplied.)

It is thus abundantly clear that Congress knew how to write a statute to accomplish what the opinion of the Court holds totally different language accomplishes.

The Senate Committee on Finance rewrote the subsection as embodied in the House Bill, altering it to read as it does in the Revenue Act of 1928.[8] This was the section which was construed in *Maguire* v. *Commissioner* and related cases.[9] It thus appears that Congress rejected the verbiage intended to specify the date of the decedent's death as the basis date to be taken by a beneficiary under the decedent's will.

With this background Congress, in adopting the 1934 act, discarded the various basis dates prescribed by the Acts of 1928 and 1932 and harked back to the language which had been used in earlier revenue acts which had uniformly been construed by the Treasury to mean that the basis date was the date when the taxpayer actually acquired as his own the property whose disposition gave rise to a taxable gain or a deductible loss. The reason for the change, as shown by the Committee Reports on the revenue act of 1934, was not a desire to alter the settled administrative construction of the phrase "time of acquisition" but to do away with the diversity between the basis dates for real and personal property which had been created by the provisions of the 1928 and the 1932 acts. No other purpose is shown by the reports.[10]

Regulations 86 were approved by the Secretary of the Treasury February 11, 1935, and were later promulgated as applicable to the Act of 1934. By these regulations it is provided: "Pursuant to this rule of law, [i. e. the doctrine of relation] section 113(a) (5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the dece-

8 Senate Report No. 960, 70th Cong., 1st Sess., p. 26.

9 For the language of the section see Note 5, McGuire *v.* Commissioner, — U. S. —.

10 Report of Subcommittee on Ways and Means of December 4, 1933, p. 17; Report of the Ways and Means Committee H. R. 704, 73d Cong., 2d Sess., pp. 27-28; Senate Report No. 558, 73d Cong., 2d Sess., pp. 34-35.

dent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property.'' It is upon this regulation that the Court relies to justify its construction of the statute.

I think the regulation plainly unjustified as an attempt on the part of the Treasury to legislate when Congress has failed to do so. The hearings on the revenue act of 1934 show that the Treasury was not satisfied with the provision the Committee recommended Congress should adopt and which Congress did adopt. It evidently attempted to rewrite the Congressional language to carry out what it thought Congress should have provided. It needs no citation of authority to demonstrate that such is not the function of a regulation and that the attempt should fail.

The CHIEF JUSTICE joins in this opinion.